Supreme Court, U.S.
FILED
05-89 JUL 13 2005
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES, AND WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT,
Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As applied to railroads, are pre-construction permitting programs *per se* preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners State of Vermont, Agency of Natural Resources, and William H. Sorrell, as Attorney General of Vermont (the "State"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported as *Green Mountain R.R. v. State of Vermont*, 404 F.3d 638 (2d Cir. 2005), and is reproduced in the appendix. App. 1a-15a. The opinion of the District Court is reported at 2003 WL 24051562 (D. Vt. Dec. 15, 2003), and is reproduced in the appendix. App. 16a-32a.

JURISDICTION

The judgment of the Second Circuit was entered on April 14, 2005. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, is reproduced at App. 33a.

Relevant sections of Vermont's Act 250, Vt. Stat. Ann. tit. 10, § 6001 *et seq.*, are reproduced at App. 37a-40a.

Relevant provisions of the Interstate Commerce Commission Termination Act ("ICCTA"), 1995, Pub. L. No. 104-88, 109 Stat. 803, codified in part at 49 U.S.C. §§ 10101-11908, are reproduced at App. 33a-36a.

STATEMENT OF THE CASE

1. This case concerns the preemptive scope of the Interstate Commerce Commission Termination Act of 1995, which refined governmental control over the economic regulation of railroads.

Prior to the ICCTA, authority over railroads was governed by the Interstate Commerce Act ("ICA") of 1887, 24 Stat. 379. In the ICA, Congress created the Interstate Commerce Commission ("ICC") and gave it broad authority to regulate the railroad industry. Under the ICA, some economic regulation of railroads was undertaken concurrently by the federal and state governments, while other regulation was left to the states. *See* Clyde B. Atchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L. Rev. 289, 313-14 (1937).

Although there were various changes made to the ICA throughout the 20th century, the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, represented a significant shift in federal policy over rail transportation. This act "began the substantial economic deregulation of the [railroads] and the whittling away of the size and scope of the ICC." H.R. Rep. No. 104-311, 104th Cong., 1st Sess., 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793-94.

The ICCTA continued the goals of the Staggers Rail Act by further "reform[ing] *economic* regulation of transportation." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess., 165 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 850 (emphasis added). The act replaced the ICC with the Surface Transportation Board ("STB"), and transferred many of the ICC's powers to the STB.

Part A of the ICCTA, which covers "Rail Transportation," includes provisions addressing the standards for establishing rates, rules, and practices for railroad operations, and it also contains provisions concerning the licensing of certain railroad activities. 49 U.S.C. §§ 10701-10747, 10901-10907. Other parts of the law cover federal-state relations regarding taxes; and enforcement, and civil and criminal penalties. *Id.* §§ 11501-11502, 11901-11908.

Continuing Congress's effort to deregulate the railroad industry, the ICCTA also limits the ability of the federal government and states to impose economic regulation on railroads. *Compare* 49 U.S.C. § 10501 (1995) *with* 49 U.S.C. § 10501 (1990). Accordingly, Section 10501(b), which is entitled "General Jurisdiction," gives the Surface Transportation Board "exclusive jurisdiction" over many aspects of rail transportation. It states:

> (b) The jurisdiction of the Board over–
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive.

App. 34a (49 U.S.C. § 10501(b)).

The ICCTA thus gives the STB jurisdiction and regulatory authority over many aspects of railroad

operations. Its jurisdiction, however, is not co-terminus with its power to regulate. Despite having *jurisdiction* over the operation or construction of "ancillary" projects, for example, the STB recognizes that it has no *regulatory authority* over these same projects. As the STB has conceded:

> Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track.

Borough of Riverdale, Petition for Declaratory Order, S.T.B. Finance Docket No. 33466, 1999 WL 715272 at *4 (I.C.C.) (Sept. 9, 1999).

Of special significance to this case, Congress also made certain remedies "exclusive" by including a preemption provision in Section 10501(b):

> Except as otherwise provided in this part, the remedies provided under this part *with respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

App. 34a (49 U.S.C. § 10501(b)) (emphasis added).

The Committee of Conference that produced the final version of the ICCTA, explained the scope of this preemption provision and "clarif[ied] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." H.R. Conf. Rep. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. The Report

stressed that Congress did not intend to preempt laws that "do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." *Id.*

2. Vermont's Act 250, Vt. Stat. Ann. tit. 10, § 6001 *et seq.*, is a statewide permitting system that has been "a major feature of the Vermont legal landscape" for over 35 years. *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 87 (2d Cir. 1992). Significantly, "[i]n recognition of the importance of economic growth . . . the focus of the Act is not on barring development but on molding it to minimize its environmental impact." *Id.* at 89.

The principal requirement of Act 250 is that a person must obtain a permit before the construction of improvements that constitute "development" as defined by the statute. App. 40a (Vt. Stat. Ann. tit. 10, § 6081). Accordingly, there is a comprehensive section in the law defining projects that constitute "development" and require a permit. App. 37a-40a (*Id.* § 6001(3)). Furthermore, Act 250 exempts certain railroad projects from the permitting process if the activity does not result in a "physical expansion of the railroad's facilities." App 40a (*Id.* § 6081(i)).

3. Respondent Green Mountain Railroad Corporation ("GMRC") is a "rail carrier" as defined by the ICCTA, 49 U.S.C. § 10102(5), and operates 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. App. 3a. Its operations include serving trans-shipping industries, *i.e.*, businesses that rely on trucks to transport goods from the rail site to other locations. *Id.*

Along its rail line, GMRC owns a 66-acre tract of land (the "Riverside site") in Rockingham, Vermont. App. 3a. The tract of land is bordered on the east side by the

Connecticut River and on the west side by railroad tracks and other property. *Id.* The Connecticut River in this area contains valuable fisheries and is a prime recreational resource. Joint Appendix, Second Circuit, at 85 (hereinafter, "JA-xxx").

a. *The Buffer Zone Condition.* In 1997, GMRC sought an Act 250 permit to construct a 20-foot by 30-foot office building and to operate a "forest products distribution yard" at the Riverside site.[1] App. 18a. In the permit application, GMRC proposed a 75-foot buffer zone along the Connecticut River to satisfy environmental criteria under Act 250, Vt. Stat. Ann. tit. 10, §§ 6086(a)(1)(E) & (F) (streams and shorelines). App. 4a. Because riparian buffers play a crucial role in protecting rivers such as the Connecticut (JA-089), the Vermont Agency of Natural Resources recommended that the buffer zone be enlarged from 75 to 100 feet. App. 4a.

On November 12, 1997, the District #2 Environmental Commission, which is the state authority that oversees projects in the Rockingham area, issued Land Use Permit #2W0038-2 (the "Dash Two" permit). App. 4a. Condition 14 of the permit required:

> The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas.

App. 18a.

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[1] GMRC did not initially dispute Act 250's pre-construction permitting requirement.

b. *The Salt Shed Permit.* In the spring of 1998, GMRC sought an amendment to its Act 250 permit, called the "Dash Three" permit application, to construct a 100-foot by 275-foot salt storage shed. App. 5a. The district environmental commission issued the Dash Three permit on January 13, 1999.

In October 1999, GMRC sought another amendment, the "Dash Three-B" permit application, to modify the size, type, color and location of the salt storage building. App. 5a. In November 1999, GMRC began construction of the modified salt storage shed without having obtained a final Dash Three-B permit. *Id.*

In January and February of 2000, the State issued two separate notices of violation to GMRC for various Act 250 violations at the Riverside site, including the construction of the unapproved salt shed and the storage of materials within the 100-foot buffer zone.[2] App. 5a.

4. Proceedings Below

a. On June 6, 2001, GMRC filed a complaint in federal district court where it admitted to various Act 250 violations, but claimed that the ICCTA preempted enforcement of those conditions.[3] App. 16a. GMRC also alleged that, as a railroad, it did not need to obtain an Act 250 permit for future construction, such as a proposed cement facility at the Riverside site, because any attempt by the State to require the railroad to obtain pre-construction permits was preempted by federal law. *Id.*

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[2] There is no dispute in this case that GMRC failed to maintain the buffer zone or that it constructed a salt shed without an approved permit.

[3] On June 5, 2001, GMRC filed a similar petition to institute declaratory proceedings before the STB, which denied the petition on May 24, 2002. App. 5a-6a.

In a motion to dismiss filed on July 17, 2001, the State argued that Act 250 is not preempted on its face by Section 10501(b) and that Act 250 has only an incidental impact on the economic activities of GMRC. App. 16a.

b. The District Court granted in part, and denied in part, the State's motion to dismiss: "[T]o the extent the Defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted. *Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA.*" JA-020 (District Court's Ruling on Pending Motions, Sept. 26, 2001) (emphasis added).

On July 15, 2003, the State filed a motion for summary judgment, and on August 22, 2003, GMRC filed a cross-motion for summary judgment. The State restated its argument that Section 10501(b) does not preempt Act 250 in this case because Act 250 does not unduly burden the railroad.

In a decision dated December 15, 2003, the District Court contradicted its earlier order and held that the State "may not apply a law like Act 250 so as to require pre-construction approval and permitting." App. 28a. It granted GMRC's cross-motion for summary judgment and denied the State's motion for summary judgment. App. 32a. The State appealed.

c. The Second Circuit affirmed on April 14, 2005, stating that the ICCTA "expressly preempts 'remedies provided under Federal and State law.'" App. 2a. It further found that the plain language of Section 10501 "reflects clear congressional intent to preempt state and local regulation of integral rail facilities." App. 15a.

The court held that "the permitting process itself" was preempted as applied to railroads because "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulations that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." App. 11a.

The court rejected the State's arguments that Act 250 is not preempted on its face and that the court should assess the actual impact of any conditions imposed. App. 11a. It held, instead, that preemption applied even if there were "permit applications affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations." *Id.* The court therefore found it unnecessary to "conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain." App. 15a.

It likewise disagreed that only *economic* regulations – *i.e.*, direct economic regulations or those that have a substantial economic impact – are preempted by the ICCTA. App. 13a. The court found the distinction "not useful" because the permitting process "necessarily interferes" with GMRC's ability to construct facilities and conduct economic activities. App. 13a-14a.

Finally, the court was unmoved by the State's argument that the district court's decision leads to illogical consequences. The State argued that because the activities at issue are ancillary projects and not under the STB's regulatory authority, they would be subject to no environmental review whatsoever if Act 250 were preempted. Despite this gap in regulatory coverage, the Court held that Act 250 was *per se* preempted.

REASONS FOR GRANTING THE PETITION

Since its enactment over ten years ago, federal and state courts have repeatedly disagreed over the preemptive force of Section 10501(b) of the ICCTA as it applies to railroad operations in general, and also as it applies to ancillary projects – which are not under federal regulatory control. In this case, the Second Circuit took an expansive view that stretches the preemptive scope of the ICCTA beyond its breaking point. Unlike most other courts, it held that pre-construction permitting programs are *per se* preempted.

This Court should grant certiorari for three reasons. First, this Court should resolve the conflict among the courts, including a direct split between the Vermont Supreme Court and its corresponding circuit court of appeals, on the preemptive scope of Section 10501(b). Second, this is a recurring issue that goes to the heart of federal-state relations and that has been fully developed by the lower courts. Third, the Second Circuit misapplied this Court's precedents and erred when it held that railroads are completely exempt from pre-construction permitting programs.

I. The Second Circuit's Decision Is In Sharp Conflict With Decisions Of Other Courts Of Appeals And State Supreme Courts.

Courts across the country are divided over the level of preemption intended by Section 10501(b).[4] The tests

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[4] The federal district court for the District of Columbia in *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 WL 975745 at *3 (D.D.C. Apr. 21, 2005), recently recognized the conflict among the courts on the preemptive breadth of Section 10501(b). It stated:

applied by the courts to determine preemption demonstrate a fundamental disagreement over how to interpret the plain language of Section 10501(b), and, more specifically, what effect to give the phrase "with respect to the regulation of rail transportation" as that phrase is used in that section. The courts have applied four distinct and conflicting tests when determining the scope of preemption of Section 10501(b).

First, the Second Circuit in this case interpreted Section 10501(b) to preempt all pre-construction permitting programs as applied to railroads because they "necessarily interfere" with a railroad's ability to construct facilities and conduct economic activities.[5] App. 14a (internal quotations omitted). Relying extensively on the Ninth Circuit's ruling in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999), the Second Circuit construed the section expansively, finding "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad

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Courts have been split on the broadness of preemption under ICCTA; some have held it preempts all state efforts, *City of Auburn* [*v. United States*], 154 F.3d [1025,] 1029-1030 [9th Cir. 1998]; *Wis*[*consin*] *Cen*[*tral*] *Ltd.* [*v. City of Marshfield*], 160 F. Supp. 2d [1009,] 1013 [W.D. Wis. 2000], and others have held it applies only to the regulation of rail transportation. *Iowa, Chi. & E. R.R. v. Wash*[*ington*]*. County*, 584 F.3d 557, 561 (8th Cir. 2004); *Fla. E. Coast R.R. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

Presumably unaware of the Second Circuit's decision seven days earlier, the district court failed to cite the opinion below.

[5] The STB, which filed an Amicus Brief in the case below, also claims that pre-construction permitting requirements are entirely preempted.

operations."[6] App. 15a. Thus, pursuant to the decision below, all state and local pre-construction permitting processes are completely preempted regardless of whether they delay, interfere, or otherwise impose *any* burden on railroad operations.[7]

Second, the Vermont Supreme Court, in direct conflict with the decision below, has held that pre-construction permitting programs are not absolutely preempted. Instead, the court has required examination of permit conditions to determine whether they interfere with railroad operations.

Third, the Eleventh Circuit and the Alaska Supreme Court have similarly rejected the Second Circuit's broad view of preemption. These courts have ruled that Section 10501(b) does not preempt regulations that have only a minimal or remote impact on rail transportation.

Fourth, the Eighth Circuit and, most recently, the North Dakota Supreme Court, have looked to whether the ICCTA addressed the same issue as the state regulation in question. These courts have found no preemption where the ICCTA does not *specifically* regulate the matter at issue.

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[6] The Second Circuit's reliance on *City of Auburn*, however, was misplaced because the Ninth Circuit's ruling turned on the presence of an additional and broader preemption provision of the ICCTA that is not at issue here.

[7] Although not reviewing a pre-construction permitting program, the Fifth Circuit has also taken a broad view of preemption under Section 10501(b). *See Friberg v. Kansas City Southern Railway*, 267 F.3d 439 (5th Cir. 2001).

A. The Decision Below Conflicts With A Decision Of The Vermont Supreme Court.

The Vermont Supreme Court's holding in *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), directly conflicts with the decision below. Despite examining a very similar land use scheme, the Vermont Supreme Court rejected the notion that Section 10501(b) amounts to a *per se* bar to pre-construction permitting requirements.

In *Vermont Railway*, an affiliate of GMRC, Vermont Railway, appealed various permit conditions imposed by the City of Burlington, Vermont, in connection with a facility that Vermont Railway operated. *Id.* at 651. Some of these conditions included requirements relating to the proposed expansion and use of a salt shed at that facility. *Id.* The railroad claimed that Burlington's zoning ordinances were "preempted entirely" by Section 10501(b). *Id.* at 650.

The Vermont Supreme Court refused to find that Section 10501(b) preempted the imposition of the pre-construction permitting program. *Id.* at 654. The court, citing the STB's decision in *King County, WA, Petition for Declaratory Order*, S.T.B. Finance Docket No. 32974, 1996 WL 545598 at *4 (I.C.C.) (September 25, 1996), recognized that "the ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads."[6] 769 A.2d at 653. The court concluded that this included the power to protect the environment. *Id.* at 655 (upholding

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[6] Thus, the STB has acknowledged that not *all* state and local regulation is preempted entirely by Section 10501(b). It appears, however, to have drawn a distinction with pre-construction permitting programs. *See supra* note 5.

conditions that were "designed to avert potential contamination from the salt shed").

The court held that "the proper approach" under Section 10501(b) is to determine whether the permit conditions "stood as an obstacle to the goals of the ICCTA." *Id.* at 655. Only if those conditions "interfere[d] with *railway* operations" would they be preempted. *Id.* (emphasis in original); *contra GMRC*, App. 9a (pre-clearance requirements are preempted because they "unduly interfere with interstate commerce"). The Vermont Supreme Court explicitly rejected the railroad's argument that any permit condition "*necessarily* has an economic impact on its railway operations such that it is preempted." 769 A.2d at 654 (emphasis in original).

In reaching its contrary position that pre-construction permitting programs are *per-se* preempted, the Second Circuit relied upon three factors: [1] "the railroad is restrained from development until a permit is issued; [2] the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and [3] the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." App. 11a.

Yet, Burlington's Zoning Ordinances ("BZO"), which were at issue in *Vermont Railway*, share these same characteristics. Both Act 250 and Burlington's Zoning Ordinances impose pre-construction permitting requirements. BZO § 4.1.3 ("No land development may be commenced within Burlington without a zoning permit"); Act 250, Vt. Stat. Ann. tit. 10, § 6081(a) ("No person shall . . . commence development without a permit"). Both have criteria to help guide applicants and reviewing agencies, but there is no ability to assure that a permit

will be issued for certain projects. BZO, § 7.1.6 (development board guided by standards "in conducting its review and imposing conditions and safeguards"); Vt. Stat. Ann. tit. 10, § 6086 (conditions and criteria for granting permits). Both give the permitting authority discretion to determine whether a project complies with certain criteria. BZO § 13.1.6(a) (board required to find that major impact developments will "not result in undue water, air or noise pollution"); Vt. Stat. Ann. tit. 10, § 6086(a)(1) (commission must find that the development "will not result in undue water or air pollution").

Consequently, the division between the Second Circuit and the Vermont Supreme Court could not be more stark. Reviewing virtually identical pre-construction permitting schemes, the Second Circuit held that these programs are automatically preempted, while the Vermont Supreme Court held that the permit conditions imposed must be evaluated to see whether they interfere with railroad operations. Whether such pre-construction permitting programs are preempted under Section 10501(b) thus depends entirely on which court heard the case. The ruling of the Second Circuit and that of the Vermont Supreme Court cannot be reconciled. Such a conflict requires resolution by this Court.

B. The Decision Below Conflicts With Decisions Of The Eleventh Circuit And The Alaska Supreme Court.

The Second Circuit's decision also conflicts with the Eleventh Circuit's decision in *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001), and the Alaska Supreme Court's decision in *Native Village of Eklutna v. Alaska R.R.*, 87 P.3d 41, 57 (Alaska 2004).

1. *Florida East Coast Railway v. City of West Palm Beach*

At issue in *Florida East Coast Railway* was whether Section 10501(b) preempted the zoning ordinances of West Palm Beach. The Eleventh Circuit found that the plain language of Section 10501(b) did not reflect broad congressional intent to preempt all local regulation of rail transportation. 266 F.3d at 1330-31; *contra GMRC*, App. 15a ("the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities"). Rather, the court determined that the phrase "with respect to regulation of rail transportation" placed express limitations on the scope of preemption of Section 10501(b). 266 F.3d at 1331. The Eleventh Circuit ruled that Congress had "narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' *i.e.*, those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation."[9] *Id.* (citations omitted).

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[9] Numerous state courts have similarly found no preemption under Section 10501(b) where regulations impose only incidental burdens on railroads. *Jones v. Union Pac. R.R.*, 94 Cal. Rptr. 2d 661, 666-67 (Cal. Ct. App. 2000) (noting "[s]tate and local regulation of Union Pacific's trains is permissible if it does not interfere with Union Pacific's interstate rail operations"); *Soo Line R.R. v. City of Minneapolis*, 625 N.W.2d 834, 836 (Minn. Ct. App. 2001) (designation of roundhouse for local heritage preservation was not preempted by ICCTA because designation did not interfere with any plan of railway to use the roundhouse); *State ex rel. Oklahoma Corp. Comm'n v. Burlington N. and Santa Fe Railway*, 24 P.3d 368, 371 (Okla. Ct. App. 2000) (statute requiring railroads to construct fences along railway rights-of-way was not preempted by ICCTA).

Even though the application of the zoning regulations might not be "optimally efficient for [the railroad's] operations," the court concluded, the "requirements do not impede the interstate functioning of the railroad industry" and could not be considered the "regulation of rail transportation" under Section 10501(b). *Id.* at 1339; *contra GMRC*, App. 15a (the court "need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain").

The decision of the Eleventh Circuit directly conflicts with the ruling below in two key respects. First, the Eleventh Circuit's narrow interpretation of the plain language of Section 10501(b) is diametrically opposed to the Second Circuit's broad view. Second, the Eleventh's Circuit focus on the *impact* of the regulation in question diverges from the Second Circuit's facial preemption analysis.

2. *Native Village of Eklutna v. Alaska R.R.*

The Alaska Supreme Court's decision in *Native Village of Eklutna v. Alaska R.R.* also conflicts with the Second Circuit's decision as to whether Section 10501(b) completely preempts pre-construction permitting programs.

In *Native Village of Eklutna*, the Alaska Railroad Corporation began operation of a quarry on culturally significant land near Anchorage, Alaska. 87 P.3d at 43-44. Eklutna, joined by Anchorage, brought suit to enjoin the railroad from operating the quarry without a conditional use permit. *Id.* The railroad argued that it was not required to obtain a conditional use permit because Section 10501(b) preempted the ordinances with respect to railroad property. *Id.* at 56.

Like the Eleventh Circuit, the Alaska Supreme Court looked to whether the zoning ordinances had "more than [an] incidental impact on [the railroad's] operations." 87 P.3d at 57. In finding that the regulations and the conditional use permit requirement were not preempted, the court recognized that "Congress's focus on *economic* regulation makes clear that it had no intention of preempting all state or local regulation that touches railroads in any way."[10] *Id.* (emphasis added). The Alaska Supreme Court stated:

> ICCTA's preemption is aimed at improving the "nationwide efficiency of the railroad industry," not at stopping all regulation that "prevents an individual firm from maximizing its profits." Local regulation may bring some hardship or inconvenience to a railroad without causing the sort of economic impact that would trigger preemption.

Id. (footnote omitted); *contra GMRC*, App. 14a (permitting process "necessarily interferes with Green Mountain's ability to construct facilities and conduct economic activities") (internal quotations omitted).

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[10] Many courts have recognized that Congress's purpose in enacting the ICCTA was to preempt only the economic regulation of railroads by States – not all regulation relating to railroads. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 658 (E.D. Mich. 2000) (discussing findings of several courts that have found that the ICCTA "preempts state law regulation of railroads in an economic sense"), *aff'd on other grounds*, 283 F.3d 812 (6th Cir. 2002); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1296 (D. Mont. 1997) (holding that the "statutory language and accompanying legislative record [of the ICCTA] evidence Congress' clear and manifest intent to occupy the entire field of economic regulation of railroad transportation").

Finally, the Alaska Supreme Court acknowledged that requiring the railroad to get a conditional use permit "will at least delay the operation of the [project] by the time needed for the Railroad to obtain a conditional use permit, and may bar the Railroad's use of the land altogether, if the permit is denied." 87 P.3d at 57 (quoting *Vermont Railway*, 769 A.2d at 654). It noted that "[w]hether this amounts to undue interference with the Railroad's operation is a 'fact-bound determination.'" *Id.*

Contrary to the reasoning of the Second Circuit, the Alaska Supreme Court found such factors insufficient to require *per se* preemption. *Contra GMRC*, App. 9a-10a, 15a (permitting process preempted because "it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely" and the court "need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain").

Therefore, the test applied by both the Eleventh Circuit and the Alaska Supreme Court, which looks to the regulation's effect on rail transportation, is in conflict with the Second Circuit's broad view of both the plain language and the preemptive scope of Section 10501(b).

C. The Decision Below Conflicts With Decisions Of The Eighth Circuit And The North Dakota Supreme Court.

The Second Circuit's decision is also incompatible with the Eighth Circuit's ruling in *Iowa, Chicago & Eastern R.R. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004), and the North Dakota Supreme Court's ruling in *Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840, 846-47 (N.D. 2005). Under the analysis of these courts, preemption is not required under Section

10501(b) unless the ICCTA specifically addresses the same issue as the state regulation in question.

1. *Iowa, Chicago & Eastern R.R. v. Washington County*

In *Iowa, Chicago & Eastern R.R.*, Washington County, Iowa petitioned the Iowa Department of Transportation for a ruling that the railroad must pay to replace or repair four "severely deficient" railroad bridges pursuant to state statutory law. 384 F.3d at 558. The railroad then sought a declaratory judgment that the Iowa statute was preempted by the ICCTA. *Id.*

In analyzing the preemptive scope of Section 10501(b), the Eighth Circuit concluded that because the ICCTA did not address the repair and replacement of railway-highway bridges, "[i]ts silence cannot reflect the requisite 'clear and manifest purpose of Congress' to preempt traditional state regulation" of this kind. *Id.* at 561 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). That finding was reinforced by the long-time federal-state partnership addressing rail safety in the Federal Rail Safety Act and also by the "traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes." *Id.* The court explicitly rejected the railroad's "broad argument that the ICCTA preempted *this type* of state regulation of railroad 'facilities.'" *Id.* (emphasis in original).

2. *Home of Economy v. Burlington Northern Santa Fe R.R.*

Similarly, in *Home of Economy v. Burlington Northern Santa Fe R.R.*, which was decided on April 6, 2005, a landowner sued a railroad claiming that he had a common-law right to have the railroad re-open a "grade crossing" to allow him access to his property. 694 N.W.2d

840-41. The railroad claimed such common-law actions were preempted by the ICCTA. The North Dakota Supreme Court reviewed Section 10501(b) and found, like the Eighth Circuit, that it preempted only matters that were specifically addressed in the ICCTA. The court concluded that Section 10501(b) did not preempt the landowner's common-law suit because the ICCTA did not "explicitly deal with grade crossings." *Id.* at 844. On the contrary, the court recognized that the states possess "traditional authority regarding grade crossings." *Id.* at 846.

The test applied by the Eighth Circuit and the North Dakota Supreme Court to determine preemption conflicts with the decision below. These courts took a narrow view and looked to whether the ICCTA *specifically* addressed the state regulation in question, while the Second Circuit took an expansive view, finding Section 10501(b) demonstrates "Congress's intent to preempt state regulatory authority over railroad operations" – regardless of whether the ICCTA addresses the exact issue in question. App. 15a.

In sum, the preemptive scope of Section 10501(b) has greatly divided state and federal courts of this country. This Court's review is necessary to resolve this conflict among the courts.

II. This Court Should Resolve A Recurring Issue Of National Import That Has Been Fully Developed By The Lower Courts.

This case involves an important and well-developed issue of federalism that should be determined by this Court. The decision below severely eviscerates state and local authorities' historic police powers, such as enforcing land use, zoning and environmental regulations, as they

are applied to railroads. In addition, this is a recurring issue that has been subject to ample analyses by the lower courts so that no further review is necessary before this Court rules on the matter.

A. This Is An Issue Of Exceptional Importance That Goes To The Heart Of Federal-State Relations.

By holding that the ICCTA displaces all state and local land use and environmental protections that operate through pre-construction permit programs, the Second Circuit has dealt a crippling blow to the ability of states and localities to protect the environment and to control development. Although the Second Circuit suggested that not all regulations are preempted, the remaining laws do not protect these areas of concern. *See GMRC*, App. 10a (finding that railroads are subject to some local regulation such as electrical, plumbing and fire codes).

Like Vermont's use of Act 250, local authorities traditionally regulate land use and protect the environment using their own zoning ordinances. Although municipalities may call the permitting schemes by different names, including "variances," "conditional use permits," and "non-conforming use permits," most municipalities have some type of pre-clearance requirement for commercial projects. Because most permitting programs require site-plan or project review before development, they would likely be preempted under the Second Circuit's sweeping decision.

Such land use regulations play a significant role in protecting the nation's natural resources. Both Congress and this Court have recognized the states' primary role in regulating land use and preserving the environment. *See, e.g., Solid Waste Agency of Northern Cook County v.*

United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (the states, not the federal government, exercise "traditional and primary power over land and water use").

Furthermore, state and local laws protect numerous interests that are not directly regulated by federal law, such as preservation of wildlife habitat and natural areas and protection of agricultural soils. *See* Vt. Stat. Ann. tit. 10, § 6086(a)(8) & (9). Eliminating Act 250 and similar local regulations leaves these interests entirely unprotected. Although critically important, federal environmental laws are not intended to, and cannot, substitute for comprehensive state regulation like Act 250 and other permit processes.

Moreover, the Second Circuit's decision produces the illogical result that these types of permitting programs are preempted regardless of what railroad projects are at issue. Thus, a railroad can claim that virtually *any* project tangentially related to rail transportation is exempt from regulation. And, as demonstrated by this case, this means there would be no environmental review – federal, state or local – over many "ancillary" projects where the STB has jurisdiction, but no regulatory authority. *See Appeal of Vermont Railway*, 769 A.2d at 653 n.* (citing STB acknowledgment that it has only limited regulatory authority). For example, under the Second Circuit's decision, if a railroad wanted to operate and use a solid waste landfill, or a rock quarry, *see, e.g., Native Village of Eklutna*, 87 P.3d at 56-57, *supra* pp. 17-19, at the terminus of or along side a rail line, it would evade all federal, state and local environmental permitting requirements. Congress could not have intended to exempt these "ancillary" projects from all environmental review, while requiring "core" rail

transportation projects to be reviewed by the STB under the National Environmental Policy Act. 42 U.S.C. § 4332(2)(C); 49 C.F.R. § 1105.6.

Nothing in the language or history of the ICCTA shows that Congress intended to completely displace historic state police powers that may only touch upon rail transportation. Environmental regulation by state and local authorities for projects outside federal regulatory control is entirely consistent with the federal-state partnership in environmental protection, with the states' historic power to regulate in this area, and with the goals of the ICCTA.

B. This Question Will Continue To Challenge The Lower Courts And They Have Fully Developed The Issue.

The Ninth Circuit in *City of Auburn v. United States* was the first circuit court of appeals to review the pre-emptive scope of the ICCTA. In 1999, the United States - in its brief in opposition to granting certiorari in *City of Auburn*, wrote that "the administrative and judicial process of construing the ICCTA and its effect on state and local regulation has only recently begun," and that "it would be premature for this Court to review questions about the ICCTA's preemptive scope before the Board and the lower courts have had the opportunity to consider the preemptive question in a variety of concrete factual settings." Brief for the Federal Respondents in Opposition to Certiorari at 11, No. 98-1511, *City of Auburn v. United States.*

Courts have now had that opportunity. As recognized by the North Dakota Supreme Court in *Home of Economy*, some courts have broadly construed Congress's preemption language in Section 10501(b) and concluded

that it preempted state or local laws. *See* 694 N.W.2d at 844 (citing 9 cases). Other courts have narrowly construed the section and have concluded that it did not preempt state or local laws. *See id.* at 844-45 (citing 6 cases). The matter has been fully vetted by the courts of this nation.

Given the continued importance of this issue, the divergent views of all these courts, and the impact of the Second Circuit's far-reaching decision, it is now time for this Court to provide guidance on this issue.

III. The Second Circuit Misapplied This Court's Precedents And Reached The Wrong Result.

This Court's preemption analysis is well established. The ultimate goal is to ascertain Congress's intent in crafting a preemption provision. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("purpose of Congress is the ultimate touchstone" in every preemption case). To determine that purpose, this Court has instructed that the language of the statute, the statutory scheme, and the legislative history should be examined. In areas where states have traditionally exercised their police powers, even greater care must be taken to assure that preemption goes no further than Congress intended. Here, the Second Circuit's decision incorrectly analyzes each of the above factors and arrives at a result that can not be squared with prior decisions of this Court.

The Second Circuit misread the plain language of Section 10501(b), and erred by not giving effect to every clause and word of the statute. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Although the Second Circuit purported to apply a plain language analysis, the court broadly, and inaccurately, stated that the ICCTA "expressly preempts 'remedies provided under Federal and State

law.'"[11] App. 2a. The actual wording of Section 10501(b), however, makes clear that only the remedies set out in Part A are exclusive. App. 34a (42 U.S.C. § 10501(b)) (remedies "provided in this part . . . are exclusive"); *c.f., Cipollone v. Liggett Group, Inc.*, 505 U.S. 505, 517 (1992) (Congress's "enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted").

In addition, Section 10501(b) contains additional limiting language overlooked by the Second Circuit. Congress made the remedies in Part A exclusive, but only "with respect to *regulation of* rail transportation." App. 34a (42 U.S.C. § 10501(b)) (emphasis added). Congress's choice to include this language demonstrates its intent to preempt only state regulation that could be considered "regulation of rail transportation." The Second Circuit's failure to appreciate the significance of this phrase, which acts to restrict the preemptive scope of Section 10501(b), further undermines the court's legal analysis. *See, e.g., Florida East Coast Railway*, 266 F.3d at 1331 (phrase "with respect to regulation of rail transportation" places express limitations on the scope of preemption under Section 10501(b)).

The Second Circuit also should have considered Section 10501(b) in *pari materia* with other sections in the ICCTA. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Other preemption provisions found in Part A of title 49 severely undercut the Second

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[11] The court also erred when it stated that the plain language gave the STB "wide authority" over the facilities at issue in this case. App. 7a. Although the STB may have jurisdiction, it does not have regulatory power over the projects. *See supra* p. 4.

Circuit's broad interpretation of Section 10501(b). For example, Section 11501, entitled "tax discrimination against rail transportation property," states:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them.

App. 36a (49 U.S.C. § 11501(b)).

This provision would be entirely unnecessary if the Second Circuit's broad interpretation of the preemptive scope of Section 10501(b) were correct. In other words, if Section 10501(b) represented "Congress's intent to preempt state regulatory authority over railroad operations," as the Second Circuit asserts (*GMRC*, App. 15a), Congress would not have needed to expressly preempt the states' ability to impose certain taxes on railroads in Section 11501(b). These activities would have *already* been preempted by Section 10501(b). *See also* 49 U.S.C. § 11321(a) (exempting railroads "from the antitrust laws and from all other law" when engaging in certain activities).

This Court's decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), further evidences the Second Circuit's misguided analysis. In that case, the Court examined whether a federal law, which gave a federal agency wide jurisdiction over the operation of grain warehouses, preempted state efforts to regulate in that area. Section 29 of the U.S. Warehouse Act stated that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this act shall be exclusive." *See Id.* at 223-24. In finding that certain claims were not preempted, the Court held:

> The test, therefore, is whether the matter on which the State assets [sic] the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

Id. at 236.

The Court then analyzed each of the allegations in the complaint and found that the act "contain[ed] no provisions relating expressly" to several of the matters at issue. *Id.* at 237. It concluded that "Congress has not foreclosed state action by adopting a policy of its own on these matters," and found no preemption. *Id.*

The *Rice* Court's analysis demonstrates that the Second Circuit's holding is not supportable. The requirement that GMRC go through Act 250's permitting process does not implicate, much less, clash with, any of the remedies provided in the ICCTA – especially considering that the STB lacks regulatory authority over the projects at issue. *Accord California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (preemption applies only where "no possible set of conditions" could be placed on permit that would not conflict with federal law).

The Second Circuit decision also fails to adhere to this Court's instruction that when "Congress legislates in a field which the States have traditionally occupied . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." *Rice*, 331 U.S. at 230 (emphasis added); *see also CSX Transp., Inc.*, 507 U.S. at 664. No clear and manifest purpose to preempt all pre-

construction permitting requirements can be inferred from the language of Section 10501(b).

That conclusion is reinforced by the ICCTA's legislative history. *See, e.g., Mid-Con Freight Sys. Inc. v. Michigan Public Service Comm'n*, 545 U.S. ___, 125 S.Ct. 2427, 2433 (2005) ("Our reading of the text finds confirmation in historical context"). Contrary to the view of the Second Circuit, a cursory review of the legislative history on the development of the preemptive scope of Section 10501(b) confirms that Congress sought to limit the scope of preemption. Initially, the House and the Senate could not agree on a common version, and a Committee of Conference was formed to produce a final bill. The Senate "intend[ed] that those States regulating intrastate rail transportation continue to be required to regulate only in a manner consistent with the [Interstate Commerce Act]." S. Rep. 104-176, at 5, 1995 WL 701522 at *6. The House sought to eliminate the states' authority "to administer economic regulation of railroads," and further advocated the complete exclusivity of federal remedies, which was "intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the [STB]." H.R. Rep. No. 104-311, at 95, 1995 U.S.C.C.A.N. at 807. The House had proposed: "Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law." *Id.* at 793.

In formulating a compromise, the Committee of Conference rejected the House's broader scope, and added the limiting phrase "with respect to regulation of rail transportation" to the House's proposed preemption clause. The Committee of Conference "clarif[ied] that the

exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." H.R. Conf. Rep. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. Therefore, preemption under Section 10501(b) was never intended to apply to all state laws that touch on rail transportation. *See, e.g., Florida East Coast Railway*, 266 F.3d at 1331 (preemption only extends to "*regulation* of rail transportation").

Finally, the Second Circuit's faulty decision is further evidenced by the illogical result it produces. As discussed above, *see supra* pp. 23-24, the *per se* preemption of permitting programs such as Act 250 allows many railroad projects to evade state and local environmental review. Because many of these projects are also outside of the STB's regulatory authority, railroads can operate in a "regulatory void" – completely free of oversight. Congress could not have intended this conclusion.

By not following this Court's precedents and failing to give the phrase "with respect to regulation of rail transportation" the limiting effect that Congress expressly intended, the Second Circuit erred in concluding that Act 250 was entirely preempted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2005

APPENDIX

United States Court of Appeals,

Second Circuit.

GREEN MOUNTAIN RAILROAD CORPORATION,
Plaintiff-Appellee,

v.

State of VERMONT, Vermont Agency of Natural Resources and William H. Sorrell, as Attorney General of the State of Vermont,

Defendants-Appellants.

No. 04-0366-CV.

Argued: Dec. 6, 2004.

Decided: April 14, 2005.

*639 Jeanne Elias, Assistant Attorney General for the State of Vermont, (Rebecca M. Ellis, Bridget Asay, Assistant Attorneys General, on the brief) Montpelier, VT, for Defendants-Appellants.

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Robert M. Jenkins III, David M. Gossett, Mayer Brown Rowe & Maw LLP, Washington D.C.; Louis P. Warchot, Dennis J. Starks, Association of American Railroads, Washington, D.C.; George A. Aspatore, Sarah J. Bailiff, Paul Guthrie, Thomas J. Healey, Paul R. Hitchcock, Theodore K. Kalick, Robert T. Opal, Louise Anne Rinn, Peter J. Shudtz, Sidney L. Strickland, Jr., of Counsel, on submission, for Amicus Curiae Association of American Railroads.

Before: CARDAMONE, JACOBS, CABRANES, Circuit Judges.

JACOBS, Circuit Judge.

Green Mountain Railroad Corporation ("Green Mountain") proposed to build transloading facilities on its property in Vermont, and brings this action seeking a declaration that Vermont's environmental land use statute, Act 250, Vt. Stat. Ann. Tit. 10, § 6001 *et seq.*, is for that purpose preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 *et seq.* (the "Termination Act"). The State of Vermont, its Agency of Natural Resources and the State Attorney General appeal from a judgment entered in the United States District Court for the District of Vermont (Murtha, *J.*), granting Green Mountain's motion for summary judgment on the preemption ground. *Green Mountain R.R. Corp. v. Vermont,* No. 01-CV-181, 2003 U.S. Dist. LEXIS 23774, at *2-3 (D.Vt. Dec. 15, 2003).

The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Surface Transportation Board (the "Transportation Board"), a federal agency, exclusive jurisdiction over "transportation by rail carriers" and "the construction ... of ... facilities ...." 49 U.S.C. § 10501(b). The term "transportation" includes a "warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102.

"We review a district court's grant of summary judgment *de novo.*" *See Young v. County of Fulton,* 160 F.3d 899, 902 (2d Cir.1998). In so doing, we construe the evidence in the light most favorable to the State as the non-moving party, and draw all reasonable inferences in

its favor. *See *640 Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For the reasons that follow, we affirm.

I

Green Mountain is a "rail carrier" as defined by the Termination Act, 49 U.S.C. § 10102(5), with 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. The line serves transhipping industries, *i.e.*, industries that rely on trucks to transport goods from the rail site for processing elsewhere. Along its rail line in Rockingham, Vermont, Green Mountain owns a 66-acre tract known as "Riverside," bounded by the Connecticut River on the east. Portions of Riverside are wetlands unusable for development.

Green Mountain proposed to build facilities at Riverside to serve the following operations: (1) unloading bulk salt arriving by rail for local distribution by truck or for temporary storage in a shed pending distribution; (2) temporary storage and transport of "non-bulk goods, such as steel pipe[s]"; and (3) unloading bulk cement arriving by rail for storage in silos and eventual transport by truck. Some of these operations are conducted within a 100-foot strip alongside the Green Mountain tracks and the Connecticut River.

Vermont argues that construction of the transloading facilities is subject to Act 250, an environmental land use statute that mandates preconstruction permits for land development. Permit applications are filed with one of nine District Commissions that evaluate environmental impact using ten criteria, including: "undue water or air pollution," Vt. Stat. Ann. Tit. 10, § 6086(a)(1), and "undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural

areas," Vt. Stat. Ann. Tit. 10, § 6086(a)(8). The District Commission's decisions are appealable to Vermont's Environmental Board; decisions of the Environmental Board are appealable directly to the Vermont Supreme Court. Vt. Stat. Ann. Tit. 10, § 6089(a) & (b). Most permit decisions under Act 250 are issued within 60 days from the filing of an application. [FN1]

> FN1. Green Mountain contends that this expedited schedule (as cited by the State) applies only to "minor" amendments to existing permits, whereas its proposal is likely to be treated as a "major" application. State statistics collected from January 1998 through December 2002 indicate that the average timetable for "major" permit applications was 303.39 days. More than half of landowner appeals of District Commission decisions to the Vermont Environmental board took more than nine months in 2001.

In 1997, PMI Lumber leased part of Riverside and applied for an Act 250 construction permit. PMI Lumber proposed to satisfy environmental criteria by a 75-foot buffer zone along the river. The Vermont Agency of Natural Resources recommended that the buffer be increased to 100 feet.

A local permitting agency subsequently issued Land Use Permit # 2W0038-2 (the "dash-2 permit") in the names of PMI Lumber and Green Mountain. Condition 14 required maintenance of a 100-foot buffer zone. When PMI Lumber ceased operations at the site, Green Mountain used it for its transloading activities. Green Mountain encroached on the buffer zone with a settling pond, storage of materials, and vehicles.

In Spring 1998, Green Mountain sought to amend the dash-2 permit to allow construction of a 100-foot by 275-foot salt storage shed. In January 1999, the State granted Land Use Permit # 2W0038-3 (the "dash-3 permit"), which stipulated conditions, including that the shed be rectangular, and either brown or dark green. Several months later, in October 1999, Green Mountain applied for another permit *641 amendment (the "dash-3B permit" application) to modify the size, color and location of the salt shed. Although no such permit issued, Green Mountain started construction of its modified salt shed in November 1999.

In January 2000, the State issued a notice of violation of the dash-2 permit, citing (among other things) storage of materials within the 100-foot buffer zone. The State issued a second notice of violation in February 2000, alleging construction of the salt shed without the dash-3B permit.

In Spring 2000, the State conducted hearings on Green Mountain's dash-3B salt shed permit application. Green Mountain objected orally and in writing that the State Environmental Commission lacked jurisdiction to adjudicate the pending permit application because the Termination Act, which expressly preempts "remedies provided under Federal or State law" and vests with the Transportation Board, a federal agency, exclusive jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501, preempts Act 250.

Faced with the threatened enforcement of Act 250, Green Mountain filed this suit in June 2001, seeking a declaration that the Termination Act preempts Act 250. Simultaneously, Green Mountain requested a declaratory order to the same effect from the Transportation Board.

The Transportation Board denied the declaratory relief in May 2002, deferring to the district court. In the meantime, the State moved to dismiss the district court action. While that motion was pending, the State issued the dash-3B permit in August 2001. A month later, the district court granted the State's motion to dismiss Green Mountain's facial challenge to the applicability of Act 250, but ordered "further development of the record" to determine whether the State's "effort to enforce one or more conditions of the [dash-2] Permit violates the [Termination Act] in this particular case." *Green Mountain R.R.*, No. 1: 01CV181, 2003 U.S. Dist. LEXIS 23774, at *2 (quoting an earlier ruling) (internal quotation marks omitted).

Following discovery, the parties cross-moved for summary judgment. On December 15, 2003, the court granted Green Mountain's motion (and denied the State's motion) on the ground that "the state's efforts to enforce Act 250 in this case are preempted under the [Termination Act]." *Id.*

II

The question presented is whether the Termination Act preempts Vermont's Act 250 with respect to the underlying permit controversy. State law is preempted by federal law when: (1) the preemptive intent is " 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose' "; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519,

525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), and *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)). The "ultimate touch-stone" of preemption analysis is congressional intent: "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal quotation marks omitted).

The Termination Act contains an express preemption clause:

> Except as otherwise provided in this part, the remedies provided under this *642 part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The Termination Act Section 10501 vests the Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). "Transportation" is expansively defined to include: "a locomotive, car, vehicle, vessel, warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9). Certainly, the plain language grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain. *See City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th

Cir.1998); *see also R.R. Ventures, Inc. v. STB,* 299 F.3d 523, 530 (6th Cir.2002) ("[I]f a railroad line falls within its jurisdiction, the [Transportation Board's] authority over abandonment is both exclusive and plenary.").

Other federal courts recognize that the Termination Act preempts most pre-construction permit requirements imposed by states and localities. *See, e.g., City of Auburn,* 154 F.3d at 1030-31 (affirming the Transportation Board's finding that the Termination Act preempted a local environmental permitting requirement); *Soo Line R.R. Co. v. City of Minneapolis,* 38 F.Supp.2d 1096, 1101 (D.Minn.1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings ... that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n,* 944 F.Supp. 1573, 1585 (N.D.Ga.1996) (finding state regulation of railroad agency closing preempted by the Termination Act).

For example, the Ninth Circuit concluded, in affirming a Transportation Board decision, that the Termination Act preempted state and local environmental regulations requiring a railway to submit to a permitting process before making repairs and improvements on its track line. *City of Auburn,* 154 F.3d at 1027-28, 1030-31. "[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *Id.* at 1031; *see also Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1580-82.

The Transportation Board has likewise ruled that "state and local permitting or preclearance requirements (including environmental requirements) are preempted

because by their nature they unduly interfere with interstate commerce." *Joint Petition for and Declaratory Order--Boston and Maine Corp. and Town of Ayer, MA,* STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), *aff'd, Boston & Maine Corp. v. Town of Ayer,* 191 F.Supp.2d 257 (D.Mass.2002)(affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); *see also Green Mountain R.R. Corp.,* Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the Transportation Board is " 'uniquely qualified to determine whether state law ... should be preempted' " by the Termination Act. [FN2] *643 *Ga. Pub. Serv. Comm'n,* 944 F.Supp. at 1584 (quoting *Medtronic,* 518 U.S. at 496, 116 S.Ct. 2240).

> FN2. Whether the Transportation Board is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is not material to the Court's decision. We therefore decline to reach the issue.

Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. Act 250's pre-construction permit requirement is preempted for two reasons: (i) it "unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations," *Town of Ayer,* STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of

railroad facilities almost indefinitely. *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13.

Nevertheless, as the district court observed, "not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety." *Id.* It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption. *Cf. Vill. of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 64 (2000) (noting the Transportation Board's position that: (1) "while state and local government entities ... retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce"; and (2) "railroads are exempt from the traditional permitting process but not ... from most other generally applicable laws").

The legislative history of the Termination Act supports this approach: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to

address and encompass all such regulation and to be completely exclusive." *See* H.R.Rep. No. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.

III

The State's primary appellate argument is that Act 250 cannot be preempted on its face unless there is "no possible set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law." *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (applying facial challenge standard in a statutory preemption case). We disagree. *644 No doubt, there could be permit applications affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations. However, what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases. *Cf. Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1169 (9th Cir.2004) (noting that in certain situations federal law preempts "the act of regulation itself, not the effect of the state regulation in a specific factual situation"). *California Coastal Commission* is easily distinguished on that basis, as well as on the absence of a preemption provision. [FN3]

FN3. In *California Coastal Commission*, a mining company sought to enjoin a state agency from requiring the company to obtain a permit to mine on federal land. The Supreme Court ruled that in the federal mining statutes, "Congress specifically disclaimed any intention to pre-empt pre-existing state authority" and that the federal mining statute "does not automatically pre-empt all state regulation of activities on federal lands." 480 U.S. at 593, 107 S.Ct. 1419. The federal mining statutes required that land-use plans of the federal agency charged with administering the federal mining statutes "provide for compliance with" existing state and federal environmental laws. *Id.* at 587, 107 S.Ct. 1419 (internal quotation marks omitted). Because the mining company sought injunctive relief "before discovering what conditions the Coastal Commission would have placed on the permit," the Court concluded that the mining company's "case must stand or fall on the question whether any *possible* set of conditions attached to the Coastal Commission's permit requirement would be pre-empted." *Id.* at 588, 107 S.Ct. 1419. Vermont failed to raise explicitly this facial preemption argument with the district court. As a result, the district court's opinion does not discuss *California Coastal Commission*. Generally, we do not consider an issue raised for the first time on appeal. *See Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103 (2d Cir.1998). However, Vermont points out that, although it never cited to *California Coastal Commission* in its submissions to the district court, it preserved this issue for appellate

> review by arguing, in its August 2001 reply to Green Mountain's opposition to its motion to dismiss, that to succeed on its facial preemption claim, Green Mountain was obligated to show "that there are no circumstances under which Act 250 could be found constitutional," and did not press the argument thereafter because it believed that the district court adopted the State's position on facial preemption when it stated, granting in part the State's motion to dismiss: "to the extent the [State] ask[s] the Court to dismiss Green Mountain's claim that the [Termination Act] preempts Act 250 under all circumstances, the motion is granted."

"The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not.... [W]here a state statute is in direct conflict" with a federal statute "or one of its processes," the "focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation." *Lockyer*, 364 F.3d at 1169.

IV

The State argues that Act 250 withstands preemption because it is an environmental, rather than economic, regulation. The distinction is not useful. "[I]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn*, 154 F.3d at 1031. Green Mountain serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are

easily encompassed within the Transportation Board's exclusive jurisdiction over "rail transportation." Notwithstanding the environmental goals of the legislation, Act 250's permitting process "necessarily interfere[s]" with Green Mountain's "ability to construct facilities and conduct economic activities." *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13. *645

V

The State argues that *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.1999), compels a different conclusion. In *Ace Auto Body*, this Court held that the section of the Termination Act relating to motor carrier operations (49 U.S.C. § 14501) did not preempt New York's police power to suppress the practice of "chasing," whereby tow trucks compete for business by racing ("often recklessly") to accidents broadcast on police radio frequencies. *Ace Auto Body*, 171 F.3d at 769, 779. The State's reliance on *Ace Auto Body* is misplaced. The federal preemption language at issue in that case provides that a state or municipality "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." *Id.* at 770 (quoting 49 U.S.C. § 14501(c)(1)). The Court held that the "related to" phrase focused the preemption on economic regulations and reflected congressional intent to leave the state's historic police powers undisturbed where "only incidental economic burdens can be discerned." *Id.* at 774. We concluded that the chasing regulations were "sufficiently safety-oriented" while having no more than an incidental economic effect on the industry. *Id.*

In contrast to the federal statute at issue in *Ace Auto Body*, the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities. "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Ga. Pub. Serv. Comm'n*, 944 F.Supp. at 1581 (holding that the Termination Act preempted state regulation of railroad agency closing). We therefore need not conduct a fact-based inquiry weighing the economic impact of Act 250's permitting process upon Green Mountain; based on the facts before the Court, the State's effort to regulate rail transportation through the Act 250 pre-permitting process is necessarily preempted by the Termination Act.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

404 F.3d 638

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GREEN MOUNTAIN RAILROAD
CORPORATION
V.
STATE OF VERMONT, VERMONT AGENCY OF
NATURAL RESOURCES, AND WILLIAM H. SORRELL,
as Attorney General of the State of Vermont

RULING ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

(Papers 52 and 63)

This case involves the extent to which, consistent with the Interstate Commerce Commission Termination Act of 1995 (hereinafter "ICCTA"), the State of Vermont and its Agency of Natural Resources (collectively referred to as "defendants" or the "state") may apply its environmental regulation statute, Act 250, to the Green Mountain Railroad Corporation's (hereinafter "Green Mountain") use and expansion of its facilities in Rockingham. The state argues the railroad's activities must comply with Act 250 and all permits issued thereunder. Green Mountain's position is any application of Act 250 is preempted by the ICCTA.

On July 17, 2001, the state moved to dismiss the plaintiff's facial challenge to the applicability of Act 250 for failure to state a claim upon which relief can be granted. See Defendants' Motion to Dismiss or, in the Alternative, to Abstain (Paper 9) at 1. Finding this

preemption issue "requires case-by-case analysis," the Court held: "[T]o the extent the defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted . . However, whether the defendants' effort to enforce one or more conditions in the 1997 Permit violates the ICCTA in this particular case requires further development of the record . . ." Ruling on Pending Motions (Paper 21) at 8, 10.

Having provided the Court with a record supplemented by affidavits and discovery, the parties have filed cross motions for summary judgment. Upon review of the undisputed, material facts, the Court finds the state's efforts to enforce Act 250 in this case are preempted under the ICCTA. Therefore, for the reasons discussed below, Green Mountain's Motion for Summary Judgment is GRANTED, and the state defendants' Motion for Summary Judgment is DENIED.

I. Background

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of any genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers,, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, a motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue for trial. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Upon review of the record, the Court finds the following material facts undisputed. Green Mountain has 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. See generally Verified Statement of Jerome Hebda (hereinafter "Hebda Statement")(appended to Paper 65 as Ex. A). It primarily operates as an interstate freight railroad, although it derives approximately 10 percent of its revenue from passengers. See Hebda Statement at para. 3.

About six years ago, in an attempt to expand its business and increase profitability, Green Mountain acquired 62 acres of land to add to its existing site in Rockingham known as "Riverside." Riverside now is approximately 66 acres and is bounded on the west by a state highway and Green Mountain's railroad line and on the east by the Connecticut River. Green Mountain uses Riverside as a yard for transloading freight between trains and trucks and for storing freight and railroad equipment. See, e.g., Hebda Statement at paras. 4, 8.

The Riverside site is within the jurisdiction of Vermont's District #2 Environmental Commission (hereinafter the "District 2 Commission"). On November 12, 1997, Green Mountain and its then tenant, PMI Lumber Transfer, Inc. (hereinafter "PMI"), obtained from the District 2 Commission Permit #2W0038-2 (hereinafter the "Dash 2 Permit"). See Dash 2 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. C). The Dash 2 Permit authorized the construction of a 20-foot by 30-foot office building and the operation of a forest products distribution yard. See Dash 2 Permit at 1. It also contained 27 conditions, including: "The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation

between the top of the bank of the Connecticut River and any disturbed areas." Dash 2 Permit at para. 14. PMI left Riverside in 1998, and Green Mountain continued using the site for transloading activities. See Hebda Statement at para. 8.

On January 13, 1999, the District 2 Environmental Commission issued Green Mountain Permit #2W0038-3 (hereinafter the "Dash 3 Permit"), which authorized the railroad to construct a salt storage shed, conveyor pit, rail siding and truck scale at Riverside. See Dash 3 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. E) at 1. The Dash 3 Permit contained 24 conditions, including that the storage shed be rectangular, next to the rail, and either brown or dark green. See Dash 3 Permit at para. 19.

Green Mountain eventually abandoned the Dash 3 Permit project as originally proposed and, on October 14, 1999, submitted another permit application, which the District 2 Commission delineated permit application #2W0038-3B (hereinafter the "Dash 3B permit"). See Dash 3B Permit Application (appended to Paper 55, Affidavit of April Hensel, as Ex. F). The Dash 3B Permit Application included a proposal for a new salt siding project and a different salt shed to be built in a different location from the one first proposed in the Dash 3 Permit. Although no final "Dash 3B Permit" was issued, Green Mountain built its proposed salt transload and storage shed.

On January 24, 2000, the District 2 Commission issued Green Mountain a notice of alleged violation of several conditions of the Dash 2 Permit, primarily relating to the failure to maintain the 100-foot buffer zone. Specifically, the state asserts the railroad has conducted prohibited

activities in the buffer zone, including storing brick, lumber and train parts, permitting the entry of vehicles in the zone, and arranging for the installation of utility poles. See Notice of Alleged Violation (appended to Paper 55, Affidavit of April Hensel, as Ex. G). Several weeks later, on February 8, 2000, it issued a notice of violation to Green Mountain for its construction of the "Dash 3B" salt shed without a permit. See Notice of Alleged Violation (appended to Paper 55, Affidavit of April Hensel, as Ex. H).

Anticipating an unfavorable outcome in state administrative proceedings, in October 2001, and again in February 2002, Green Mountain requested a declaratory order from the Surface Transportation Board (hereinafter "STB"). Through those requests, it sought permission to continue construction at Riverside to permit it to transload bulk cement and otherwise expand its operations. According to Green Mountain, its proposed facility requires construction of a spur track within the 100-foot buffer zone. Citing this Court's enforcement authority and its intent to resolve these issues without referring the matter, the STB declined to issue the requested declaratory order. See In re Green Mountain, Railroad Corp., STB Finance Docket No. 34052, 2002 WL 1058001 (ICC)(May 24, 2002) (appended to Paper 65 at Ex. S).

In December 2002, Green Mountain requested a declaratory ruling from Vermont's District Environmental Coordinator as to whether its proposed construction of cement silos and a utility building requires an amendment to its existing Act 250 permit or whether the project falls within a statutory exception to the permit requirement. The District Coordinator determined an

amendment to the permit was required, and Green Mountain appealed the jurisdictional opinion to the Environmental Board. The Environmental Board held a hearing on Green Mountain's appeal on June 25, 2003, and ultimately affirmed the District Coordinator's advisory opinion. See Declaratory Ruling #422 (appended to Paper 65 as Ex. I) at 8, sections B and C.

According to Green Mountain's president, Jerome Hebda, the expansion of Riverside that has thus far been completed has been "modestly successful." See Hebda Affidavit at para. 5 (In 1997, Green Mountain originated and terminated 416 carloads; by 2000, that number had nearly doubled). Nevertheless, Mr. Hebda maintains the state's Act 250 requirements are economically detrimental to the railroad's operations. He explains:

> [T]he circumstances now faced by GMRC [Green Mountain] are not the same as those we faced in 1997, when PMI and GMRC jointly sought Act 250 authority to construct an office building and forest products distribution yard at Riverside. The expansion of GMRC's Riverside business since that time requires that GMRC utilize its property more extensively than appeared to be necessary in 1997. Ground storage of goods that have arrived by rail and await removal by truck, or which arrive by truck and await loading into rail cars, is an essential part of our business and requires more land as the business grows. Our customers have requested rate quotations from GMRC that include transloading and temporary storage of goods between rail and truck shipments, and GMRC has provided such rates in order to attract and retain the business. . . . Moreover, storage areas must be

> interspersed with passageways for vehicular access and must be situated as closely as possible to rail tracks in order to minimize the distance and time consumed in the removal of shipments from railcars and the loading of shipments into railcars. . . . Electric service is needed at the site to provide electric power and illumination during short days. Depriving GMRC of the use of all land at Riverside within 100 feet of the Connecticut River would not only bring business growth to a standstill, but limit GMRC's ability to handle existing business.

Hebda Statement at para. 22.

II. Discussion

A. Act 250 as a Preclearance Statute

Act 250 is Vermont's land use statute. It was enacted to protect the state's environmental resources and to preserve its public lands. See Southview Assoc. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992). The Act establishes a statewide permitting process for various forms of land development. See 10 V.S.A. § 6001-6108. When implementing Act 250, the state attempts to coordinate maximum economic development with minimal environmental impact. As applied, however, Act 250 establishes a preclearance permitting process; a development subject to Act 250 cannot proceed until it has received state approval and an Act 250 permit. See In re Spring Brook Farm Found., Inc., 164 Vt. 282, 285 (1995)("Vermont's land use law, Act 250, requires a permit prior to the commencement of any development.")

When Green Mountain and PMI, a non-railroad business, jointly operated at Riverside, the site arguably had been partially subject to Act 250 regulation, as least so far as PMI's activities were concerned. Now, as a rail

carrier operating alone at Riverside, Green Mountain's activities are subject to oversight under the ICCTA, 49 U.S.C. §§ 10101 et seq., as administered by the STB, 49 U.S.C. § 10501.

The plaintiff maintains all conditions included in permits issued pursuant to Act 250 now are preempted by the ICCTA, and the state cannot enforce its permits or require a new permit for the proposed Riverside expansion. "State law is preempted by federal law only when 1) a federal statute expressly preempts state action, 2) state law is in direct conflict with federal law, or 3) federal regulation is pervasive in the field." Omva, Inc. v. Vermont, 80 F. Supp. 2d 211, 217 (D. Vt. 2000) (citing Cipollone v. Ligaett Group, Inc.,, 505 U.S. 504, 516 (1992)).

The ICCTA contains the following preemption provision:

> The jurisdiction of the [STB] over
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

By this provision, Congress granted the STB broadened preemptive jurisdiction over facilities that are an integral part of railroad transportation. See City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998); see also CSX Trans. Corp. v. Georqia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996)(ICCTA preempts state regulatory authority over rail agency closings). When addressing the preemptive scope of 49 U.S.C. § 10501(b), courts have found most zoning ordinances and local land use permit requirements are preempted. See, e.q., Railroad Ventures, Inc. v. STB, 299 F.3d 523, 530 (6th Cir. 2002)("if a railroad line falls within its jurisdiction, the STB's authority over abandonment is both exclusive and plenary"); CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000)("if there is to be a limit on the amount of time that a train is preempted because they necessarily interfere with a rail permitted to block a crossing, it must come from the federal government"), aff'd, 283 F.3d 812 (6th Cir. 2002); see also Guckenberq v. Wisconsin Cent. Ltd., 178 F. Supp. 2d 954, 959 (E.D. Wis. 2001) (common law nuisance claim is preempted where suit "seeks to proscribe activity . . . on [railway's] side track").

Specifically, courts have noted that preclearance requirements, including environmental requirements, are carrier's ability to construct facilities and conduct economic activities. "To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, [it] is preempted by the Interstate Commerce Commission Termination Act." CSX Transp., 92 F. Supp. 2d at 658.

Nevertheless, not all state and local regulations are preempted; local bodies retain certain police powers which protect public health and safety. See Dakota, Minnesota & Eastern R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1011 (D.S.D. 2002) (state eminent domain statute which requires railroad to provide free easement to utility companies is not preempted by ICCTA); Laviqne v. CXS Transp., Inc., 2002 WL 1424808 (Mich. App. 2002) (affirming trial court's granting of an easement by necessity over tracks for access to plaintiff's property). For example, the Vermont Supreme Court has found certain City of Burlington zoning ordinances are not preempted by the ICCTA, including "control activities such as routing of trucks leaving the facility," and "conditions designed to avert potential contamination from the salt shed" because such regulations do not interfere with railroad operations, but rather address matters within a municipality's traditional police powers. See In re Vermont Ry., 171 Vt. 496 (2000). The parameters of ICCTA preemption have been elucidated in some STB decisions as well As the agency charged with administering the ICCTA, the STB's interpretation of the statute and its preemptive reach is entitled to consideration. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); In re Vermont Ry., 171 Vt. at 500.

In Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Aver, STB Finance Docket No. 33971, 2001 WL 458685 (ICC) at *5-6 (Apr. 30, 2001), the STB provided guidance as to how 49 U.S.C. § 1051(b) applies to state and local regulation of an existing facility. In part, the STB opined:

Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. . . .

This does not mean that all state and local regulations that affect railroads are

preempted . . . . [S]tate and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted . . . . While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. . Furthermore, a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments, and "voluntary agreements must be

> seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." . . .

Finally, nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act. . . . Thus, the lack of a specific environmental remedy at the Board or under state and local laws (as to construction projects such as this, over which the Board lacks licensing power) does not mean that there are no environmental remedies under other Federal laws.

Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted. (citations and footnotes omitted).

Thus, local governments may require railroads such as Green Mountain, in advance of construction, to "share their plans with the community, when they are undertaking an activity for which another entity would require a permit . . . ." Id. at *7; see also 49 C.F.R. § 1105.1 et seq. (administrative rules which ensure the STB's consideration of environmental and energy factors

under federal laws like NEPA). It is clear that, in cases such as this one, they may not apply a law like Act 250 so as to require pre-construction approval and permitting. Such a procedure is preempted by the ICCTA. See Cities of Auburn and Kent, Wa.-Petition for Declaratory Order-Burlington Northern Railroad Co-Stampede Pass Line, STB Finance Docket No. 33200, 1997 WL 362017 (ICC)(July 1, 1997) (state or local permitting process for prior approval of project, even an environmental review process, is preempted).14

B. The Salt Shed

The state, in part, contends Green Mountain built a salt shed prior to obtaining an Act 250 permit and continues to use the salt shed without a permit. See Defendants' Reply Memorandum (Paper 66) at 13. This claim is somewhat confusing in that the Dash 3 Permit authorizes "the construction and operation of a 100-foot by 275-foot salt storage shed, conveyor pit, rail siding and truck scale." See Dash 3 Permit at 1. In any event, as discussed supra, the state cannot order Green Mountain to obtain an Act 250 permit prior to constructing a salt shed because this action would operate as a prohibited preclearance requirement.

The January 13, 1999 permit also provides, "[t]he building shall be either brown or dark green in color to mitigate the visual impact of its 300 [foot] length." Dash 3 Permit at para. 19. The Dash 3 Permit Application later proposed the building would be an "earthtone" or "sandstone" color. See Dash 3B Application at criterion 8. The state maintains the roof of the salt shed is "beige" and does not comply with the permit's requirement of being either "brown" or "dark green." See Defendants' Memorandum of Law (Paper 53) at 17 n.5.

At most, this appears to be a de minimis transgression. Green Mountain argues that, to comply with the state's "color demand," it "would essentially have to scrap the old shed and construct a new one." Plaintiff's Memorandum of Law (Paper 64) at 23. Any order requiring substantial renovation or destruction to the salt shed because of its color would obviously unduly interfere with rail operations and thereby run afoul of the ICCTA. In any event, assuming this "color" requirement is similar to a non-discriminatorily-applied planning and zoning requirement which the STB has suggested is within local discretion, the Court concludes that the color "tan" is sufficiently "brown" or "earthtone" so as to be in compliance with the Dash 3 Permit's requirement.

C. Planned Cement Silo and Spur Track

Green Mountain also has proposed improvements at Riverside which include a rail siding, a new roadway, four 22foot-diameter silos to hold cement, ramps, and a 12' x 20' office and utility building. If operated as planned, the cement cargo will arrive in hopper cars, be dumped into a pit, moved by a conveyor belt into a silo, and then dispensed from the silo to trucks for distribution. According to Green Mountain, this project "requires alterations to existing rail track, a truck scale, and modification of vehicular access, and - like the salt shed siding - will involve less than 10 acres of disturbed land." See Paper 64 at 14.

The cement silos Green Mountain has proposed to construct for use by a transloading customer will have a 500-ton capacity, the equivalent of five rail cars, and will approach 100 feet in height. If necessary, the railroad will employ sound barriers to diffuse undue noise. See Hebda Statement at para. 14. The Green Mountain customer

which plans to use these silos will generate approximately $180,000 per year in revenue. See Hebda Statement at para. 16. Green Mountain also explains that it plans to construct a 1000 foot spur track to enhance commercial flexibility for its customers. See Hebda Statement at para. 19.

"[W]hen section 10501(b) grants the STB exclusive jurisdiction over `transportation by rail carriers'," it logically includes the yard, property, facilities, and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property." Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998). While the state has the right to review these plans, it cannot, consistent with ICCTA preemption, require Green Mountain to secure Act 250 permits before commencing construction.

C. The Buffer Strip

Condition 14 of the Dash 2 Permit requires Green Mountain to maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas. This condition was renewed in the Dash 3 Permit. It is undisputed that Green Mountain's activities and construction have disturbed portions of the strip.

According to the plaintiff, of the approximately 66 acres at the Riverside site, about 31 acres are unusable wetlands. Of the remaining 35 acres, the state-imposed buffer zone consumes approximately 19 acres, thereby severely restricting the railroad's ground storage capacity and other usable land. Green Mountain also states that its current use of the buffer zone to store materials is necessary to carry out its rail activities. See Paper 65 at

para. 20. According to Green Mountain, these facts demonstrate the buffer zone's undue interference with its rail operations. See Plaintiff's Reply (Paper 69) at 4 and n.3.

It is undisputed that Riverside is located near the Connecticut River, a valuable environmental and recreational resource. According to the state, the buffer zone protects the fish habitat, prevents erosion of the stream bank, helps maintain water quality, and provides an aesthetic benefit. Nevertheless, maintenance of this buffer zone necessarily has an economic impact on Green Mountain's ability to expand its business. Under similar circumstances, both courts and the STB have determined that state environmental regulations, however laudable, are preempted under the ICCTA. See supra at Section IIA

III. Conclusion

To the extent the state is applying Act 250 to Green Mountain's plans as a preclearance permitting process, its actions are preempted by the ICCTA. The state, however, is not without remedies. It may require prior notification of proposed projects and seek voluntary compliance with applicable Act 250 standards. It may also have standing to seek compliance with applicable federal laws, such as the Clean Air Act and the Clean Water Act. See Joint Petition, 2001 WL 458685 at *5 ("nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes . . .").

Green Mountain's Motion for Summary Judgment is GRANTED. The state's Motion for Summary Judgment is DENIED. SO ORDERED.

Dated at Brattleboro, Vermont, this 15 day of December, 2003.

United States District Court

District of Vermont

GREEN MOUNTAIN RAILROAD CORPORATION,

Plaintiff,

v.

STATE OF VERMONT, VERMONT. AGENCY OF NATURAL RESOURCES, and WILLIAM H. SORRELL, as Attorney General of the State of Vermont,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE.NUMBER: 1:01-CV-181cft

☐ Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Ruling on Cross Motions for Summary Judgment (Paper No. 70) filed December 15, 2003, plaintiffs Cross-Motion for Summary Judgment (Paper No. 63) is GRANTED and defendants' Motion for Summary Judgment (Paper No. 52) is DENIED. JUDGMENT is hereby entered for plaintiff Green Mountain Railroad Corporation against defendants State of Vermont, Vermont Agency of Natural Resources, and William H. Sorrell.

RICHARD PAUL WASKO

Clerk

Date: December 16, 2003

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. VI cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

Title 49. Transportation

Subtitle IV. Interstate Transportation

Part A. Rail

Chapter 105. Jurisdiction

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

United States Code

Title 49. Transportation

Subtitle IV. Interstate Transportation

Part A. Rail

Chapter 115. Federal-state Relations

§ 11501. Tax discrimination against rail transportation property

* * *

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

VERMONT STATUTES ANNOTATED

TITLE TEN. Conservation and Development

CHAPTER 151. State Land Use and Development

SUBCHAPTER 1. General Provisions

§ 6001 Definitions

When used in this chapter:

(3)(A) "Development" means:

(i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

(iii) The construction of improvements for commercial or industrial purposes on a tract or tracts of land, owned or controlled by a person, involving more than one acre of land within a municipality that has adopted permanent zoning and subdivision bylaws, if the municipality in which the proposed project is located has elected by ordinance, adopted under chapter 59 of Title 24, to have this jurisdiction apply.

(iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within any continuous period of five years.

(v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

(vi) The construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet.

(vii) Exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material.

(viii) The drilling of an oil and gas well.

(B) Notwithstanding the provisions of subdivision (3)(A) of this section, if a project consists exclusively of any combination of mixed income housing or mixed use and is located entirely within a downtown development district designated pursuant to 24 V.S.A. § 2793, "development" means:

(i) Construction of mixed income housing with 100 or more housing units or a mixed use project with 100 or more housing units, in a municipality with a population of 20,000 or more.

(ii) Construction of mixed income housing with 50 or more housing units or a mixed use project with 50 or more housing units, in a municipality with a population of 10,000 or more but less than 20,000.

(iii) Construction of mixed income housing with 30 or more housing units or a mixed use project with 30 or more housing units, in a municipality with a population of 5,000 or more and less than 10,000.

(iv) Construction of mixed income housing with 20 or more housing units or a mixed use project with 20 or more housing units, in a municipality of less than 5,000.

(v) Construction of 10 or more units of mixed income housing or a mixed use project with 10 or more housing units where the construction involves the demolition of one or more buildings that are listed on or eligible to be listed on the state or national register of historic places.

(C) For the purposes of determining jurisdiction under subdivisions (3)(A) and (3)(B) of this section:

(i) Housing units constructed by a person partially or completely outside a designated downtown development district shall not be counted to determine jurisdiction over housing units constructed by a person entirely within a designated downtown development district.

(ii) Within any continuous period of five years, housing units constructed by a person entirely within a designated downtown district shall be counted together with housing units constructed by a person partially or completely outside a designated downtown development district to determine jurisdiction over the housing units constructed by a person partially or completely outside the designated downtown development district and within a five-mile radius.

(iii) All housing units constructed by a person within a designated downtown development district within any continuous period of five years, commencing on or after the effective date of this subdivision, shall be counted together.

(iv) In the case of a project undertaken by a railroad, no portion of a railroad line or railroad right-of-way that will not be physically altered as part of the project shall be

included in computing the amount of land involved. In the case of a project undertaken by a person to construct a rail line or rail siding to connect to a railroad's line or right-of-way, only the land used for the rail line or rail siding that will be physically altered as part of the project shall be included in computing the amount of land involved.

* - - - - - *

VERMONT STATUTES ANNOTATED

TITLE TEN. Conservation and Development

CHAPTER 151. State Land Use and Development

SUBCHAPTER 4. Permits

§ 6081 Permits required; exemptions

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter.

* * *

(i) The repair or replacement of railroad facilities used for transportation purposes, as part of a railroad's maintenance, shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section, provided that the replacement or repair does not result in the physical expansion of the railroad's facilities.

Supreme Court, U.S.
FILED
SEP 26 2005
OFFICE OF THE CLERK

No. 05-89

In the Supreme Court of the United States

STATE OF VERMONT, *et al.*,

Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

The ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, *codified in relevant part at* 49 U.S.C. §§ 701-727, 10101-11908, amended and expanded the scope of the Interstate Commerce Act's express preemption provision. As amended, the statute specifies:

> The jurisdiction of the [Surface Transportation Board ("STB")] over—
>
> > (1) transportation by rail carriers * * *, and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities * * *
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The question presented is whether local or state governments may require railroads to participate in pre-construction permitting programs before undertaking rail transportation activities and operations that, pursuant to this provision, fall within the STB's "exclusive" jurisdiction.

RULE 29.6 STATEMENT

Respondent Green Mountain Railroad Corporation ("Green Mountain") has no parent corporations and no publicly held company owns 10% or more of its stock. Green Mountain is one of five shortline railroads that share common ownership and that together comprise the Vermont Rail System. The four other railroads in the Vermont Rail System are the Vermont Railway, Inc., The Clarendon and Pittsford Railroad Company, the Washington County Railroad Company, and the New York & Ogdensburg Railway Co., Inc. The recently formed Otter Creek Railroad Company is also part of the Vermont Rail System, but has not yet applied for STB licensure.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

As the court of appeals ably demonstrated, 49 U.S.C. § 10501(b) precludes states or localities from requiring railroads to participate in pre-construction permitting processes for rail transportation activities and operations that fall within the exclusive jurisdiction of the Surface Transportation Board ("STB" or "Board"). Although petitioners identify numerous cases that they assert conflict with the Second Circuit's decision on this question, in fact there is no such disagreement; rather, every court to consider the issue has so held, as has the STB.

Petitioners have never disputed that the facilities Green Mountain proposed to construct in this case fall within the scope of the STB's jurisdiction over rail transportation activities and operations—as both the district court and the court of appeals found. Every court to consider the applicability of a state permitting statute to rail transportation facilities within the STB's jurisdiction has concluded that the state permitting system is preempted by Section 10501(b). The cases that petitioners assert conflict with the decision below have instead involved a different, fact-bound question: whether specific activities undertaken by a railroad fell within the statutory definition of rail "transportation," and thus within the exclusive jurisdiction of the STB. That issue is distinct from whether a state may require a railroad to participate in a prior permitting scheme for rail transportation activities or facilities that unquestionably *do* fall within the STB's jurisdiction. Thus, these cases in no way conflict with the decision below, and there is no reason for this Court to grant review.

STATEMENT

A. The History Of Railroad Regulation.

1. Congress has extensively regulated the nation's railroad system for over a century. See *Pittsburgh & Lake Erie R.R. Co.* v. *Ry. Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *City of Auburn* v. *United States*, 154 F.3d 1025, 1029

(9th Cir. 1998). In fact, "[t]he [Interstate Commerce Act of 1887 ("ICA"), Pub. L. No. 49-104, 24 Stat. 379], * * * which, as amended, still governs federal regulation of railroads, has been recognized as 'among the most pervasive and comprehensive of federal regulatory schemes.'" *City of Auburn*, 154 F.3d at 1029 (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

As Congress has explained, over time "[t]he combination of * * * onerous Federal regulations and stiff competition from the motor carrier industry proved lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial collapse." H.R. REP. NO. 104-311, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802. Thus, starting with the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 194, Congress "began the substantial economic deregulation of the surface transportation industry." H.R. REP. NO. 104-311, at 82, 1995 U.S.C.C.A.N. at 793-794.

Congress continued this process of deregulation in the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, *codified in relevant part at* 49 U.S.C. §§ 701-727, 10101-11908, which abolished the Interstate Commerce Commission ("ICC") and transferred a portion of the ICC's regulatory functions to the STB.[1] The ICCTA "builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector. * * * The [Act] keeps bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate." H.R. REP. NO. 104-311, at 93, 1995 U.S.C.C.A.N. at 805.

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[1] Under the ICA, as amended by the ICCTA, the STB regulates the construction, operation, and abandonment of rail lines (49 U.S.C. §§ 10901-10907), railroad rates and service (49 U.S.C. §§ 10701-10747, 11101-11124), and rail carrier consolidations, mergers, and common control arrangements (49 U.S.C. §§ 11323-11327).

2. It has long been understood that *state* regulation of the railroad system would, in many instances, undermine the *federal* regulatory scheme. See *Kalo Brick*, 450 U.S. at 318. Thus, the history of railroad regulation since the passage of the ICA in 1887 has been one of steady erosion of state regulatory authority. The original ICA gave the ICC significant powers that supplanted some state regulation. See *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456, further enlarged the ICC's powers and diminished the regulatory sphere of the states. And with the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, Congress further limited the regulatory authority of the states, while also substantially reducing the amount of federal regulation. See *ICC* v. *Texas* ("*Texas*"), 479 U.S. 450, 460-461 (1987).

Prior to 1980, although the federal government had the responsibility under the ICA to regulate the railroad system, the states were heavily involved in *intrastate* rail regulation. In the Staggers Act, Congress provided that, in general, state regulatory commissions could continue to regulate only if they applied federal standards. See *Texas*, 479 U.S. at 452-454. The states, however, still at that time retained the right to regulate the "construction, acquisition, operation, abandonment, or discontinuance of [intrastate] spur, industrial, team, switching, or side tracks," over which the ICC had no licensing authority. 49 U.S.C. § 10907(b)(1) (1982); *Ill. Commerce Comm'n* v. *ICC*, 879 F.2d 917, 922-23 (D.C. Cir. 1989).

As part of the ICCTA, enacted in 1995, Congress terminated entirely even this residual regulatory authority of state and local governments over rail operations. The Senate Report on the ICCTA explained this decision, which was the culmination of a long and deliberate process beginning with the passage of the ICA more than a century before:

> The railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficient and competitive viability.

S. REP. NO. 104-176, at 6 (1995).

Thus, former Section 10501(c), which had expressly reserved the states' power to regulate intrastate transportation, was eliminated. Also eliminated was former Section 10103, which had stated that the federal remedies provided in the ICA were "in addition to remedies existing under another law or at common law." Finally, the express preemption provision of the Act, Section 10501(b), was strengthened. As amended by the ICCTA, it now provides:

> The jurisdiction of the Board over—
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> > (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
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> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclu-

> sive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). For purposes of Section 10501(b), the term "transportation" is defined broadly to include all of the related facilities and services used for that transportation. See 49 U.S.C. § 10102(9).[2]

Section 10501(b) thus makes the STB's "jurisdiction" over *all* rail transportation and rail transportation facilities—including even entirely intrastate ancillary facilities and track over which the states formerly had regulatory authority—"*exclusive.*" *Ibid.* (emphasis added).

As the courts have repeatedly observed, "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations'" than this statutory provision. Pet. App. 15a (quoting *CSX Transp., Inc.* v. *Ga. Pub. Serv. Comm'n* ("*CSX*"), 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)); see also *City of Auburn*, 154 F.3d at 1030 (same). Congress, too, has recognized the extraordinary breadth of Section 10501(b). As it explained in the House Report accompanying the ICCTA,

> [Revised Section 10501] reflect[s] the *direct and complete preemption* of State economic regulation of railroads. * * * Although States retain the police

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[2] Section 10102(9) defines "transportation" to "include[]":

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
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> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9). See Pet. App. 2a.

> powers reserved by the Constitution, *the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.*

H.R. REP. NO. 104-311, at 95-96, 1995 U.S.C.C.A.N. at 807-808 (emphasis added). As Congress also stressed, this broad preemption of state regulation is necessary to preserve the free flow of interstate commerce and to prevent the "balkanization" of rail regulation. *Ibid.*[3]

3. Although, pursuant to the ICCTA, the states no longer have the authority to regulate "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State" (49 U.S.C. § 10501(b)(2)), Congress also chose

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[3] The House Report addresses a slightly earlier version of the statute than the one that was eventually enacted as the ICCTA. In that version, the language that became Section 10501(b) was split into two sections, 10103 & 10301(b). However, the text of Section 10501(b) in the enacted version contains exactly the same language as these earlier provisions, and therefore the House Report is directly applicable.

Petitioners cite to the Conference Report that also accompanied the ICCTA for the propositions that "'the exclusivity [of federal law mandated by the ICCTA] is limited to remedies with respect to rail regulation—not State and Federal law generally,'" and that "Congress did not intend to preempt laws that 'do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.'" Pet. 4-5 (quoting H.R. CONF. REP. NO. 104-422, at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852). However, petitioners ignore the specific examples of such laws that are included in the Conference Report: "criminal statutes governing antitrust matters not preempted by [the ICCTA], and laws defining such criminal offenses as bribery and extortion." H.R. CONF. REP. NO. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. These examples clarify the narrow scope of the laws that Congress believed would not be preempted by the ICCTA—basically, the states' generally applicable police powers to the extent that those police powers do not impose a substantial burden on rail transportation. See Pet. App. 10a; page 12, *infra*.

not to give the STB licensing authority over these ancillary rail facilities and tracks. See 49 U.S.C. § 10906 ("The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."). Instead, as part of its decision to make rail regulation entirely federal and to lessen the regulatory burden on railroads (see pages 2-4, *supra*), Congress expressly chose to leave these projects unregulated. See 49 U.S.C. § 10501(b). As Congress explained in the House Report accompanying the ICCTA, "[t]he bill is intended to standardize all economic regulation (*and deregulation*) of rail transportation under Federal law." H.R. Rep. No. 104-311, at 95, 1995 U.S.C.C.A.N. at 807 (emphasis added).

B. Vermont's Act 250.

Vermont's environmental land-use statute, Act 250, codified at Vt. Stat. Ann. Tit. 10 § 6001 *et seq.*, "mandates preconstruction permits for land development." Pet. App. 3a; see also *In re Spring Brook Farm Found., Inc.*, 671 A.2d 315, 317 (Vt. 1995); Pet. 5. The Act sets forth an elaborate and cumbersome system for the consideration of any permit application.

In particular, under Act 250, local "District Commissions" composed of three appointed public representatives evaluate projects based on ten statutory criteria, such as a project's effect on "'water or air pollution'" and on "'the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.'" Pet App. 3a-4a (quoting Vt. Stat. Ann. Tit. 10 § 6086(a)(1), (8)).

Various "statutory" parties—including local municipalities, local municipal planning commissions, and any affected state agencies—are entitled to participate fully in the hearing on an Act 250 permit application. See Vt. Stat. Ann. Tit. 10 §§ 6084-6085. Neighboring landowners, too, are entitled to participate if they can show that a permit may have a direct

effect on their property with reference to any of the 10 statutory criteria (including "aesthetics")—as can any other individual or organization that can plausibly assert an interest in the Commission's consideration of the permit. See *ibid.*

In reviewing an application, the District Commission may craft specific "requirements and conditions" for any development permit. See Vt. Stat. Ann. Tit. 10 § 6086(c). Any party to a permit hearing is entitled to offer evidence on why a permit should not be issued or to propose specific conditions that should be imposed on that permit. *Id.* §§ 6085-6086. Once a District Commission decides whether to issue an Act 250 permit and what conditions to impose on that permit, either the applicant or any of the statutory parties may appeal the Commission's decision to the State Environmental Board and from there to the State Supreme Court. See Pet. App. 3a-4a; Vt. Stat. Ann. Tit. 10 §§ 6085(c), 6089. Projects about which there is any dissent from any of these numerous parties can be delayed for years. Cf. Pet. App. 4a n.1.

C. Factual Background.

1. Respondent Green Mountain Railroad Corporation ("Green Mountain") is a Class III rail carrier (as defined by 49 U.S.C. § 10102(5) and 49 C.F.R. § 1201.1-1(a)) regulated by the STB. It operates approximately 52 miles of track between Rutland, Vermont and Cold River, New Hampshire, on which it offers both freight and passenger rail service as part of the interstate rail network. Pet. App. 3a. In particular, Green Mountain uses this line to serve shippers and to transload goods, *i.e.*, to move freight between rail cars and trucks. See *ibid.*

Green Mountain owns a 66-acre facility known as "Riverside," in Rockingham, Vermont, which is bounded by its rail line and the Connecticut River. Pet. App. 3a. In connection with its rail operations, Green Mountain has built or proposed building tracks and facilities on the site to support three types of operations involving the transloading of freight

between rail and trucks: (i) unloading bulk salt arriving by rail car either directly into trucks or into a storage shed until truck distribution occurs; (ii) unloading and temporarily storing non-bulk goods, such as steel pipe and lumber, awaiting truck transport; and (iii) unloading bulk cement arriving by rail car either directly into trucks or into storage silos awaiting truck distribution. See Pet. App. 3a. There is no dispute that all of these transloading operations fall within the ICCTA's expansive definition of "transportation," 49 U.S.C. § 10102(9).[4] There is also no dispute that Riverside is the only site on the Green Mountain line with sufficient space to accommodate Green Mountain's transload needs on a growth basis. See 2d Cir. J.A. at A-293.

In 1997, PMI Lumber Transfer, Inc. ("PMI"), a corporation that at the time leased a portion of Riverside to operate a forest-products distribution yard, sought an Act 250 permit to construct an office building on the site. See Pet. App. 4a. The local District Commission granted the requested permit, but in so doing insisted on a number of conditions, including a 100-foot buffer zone along the Connecticut River that would render the majority of the Riverside site unusable for rail operations. Thereafter, Green Mountain also sought several Act 250 permits for development projects related to its transloading operations—such as permits to build a new storage shed for bulk salt—but when the requested permits either were not issued or were issued only subject to burdensome conditions, Green Mountain ceased to participate in the Act 250 permitting process. *Id.* at 5a.[5] After the state cited Green Mountain

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[4] See Pet. 26 n.11; see also, *e.g.*, 49 U.S.C. § 10102(9)(B) ("transportation" defined to include the services provided by, and the facilities used by, rail carriers); *Green Mountain R.R. Corp.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34052, 2002 WL 1058001, at *4 (served May 28, 2002); Pet. App. 7a-8a.

[5] As the Association of American Railroads ("AAR") explained in its amicus brief in the Second Circuit, voluntary notification of potential projects is the norm in the industry—railroads are not averse to working

for several asserted violations of Act 250, Green Mountain filed this declaratory action seeking a ruling that Act 250 was preempted by the ICCTA as applied to its rail transloading operations at Riverside.[6]

2. The district court granted Green Mountain summary judgment on the ground that Section 10501(b) preempts the Act 250 permitting process as applied to Green Mountain's use and expansion of the Riverside facility. Pet. App. 17a. It noted that "[w]hen Green Mountain and PMI, a non-railroad business, jointly operated at Riverside, the site arguably had been partially subject to Act 250 regulation, a[t] least so far as PMI's activities were concerned." Pet. App. 22a. But, the

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cooperatively with local authorities to resolve critical local concerns—and discussions between railroads and local authorities resolve most local conflicts. See AAR 2d Cir. Br. 3. In fact, the district court recognized that "local governments may require railroads such as Green Mountain, in advance of construction, to 'share their plans with the community, when they are undertaking an activity for which another entity would require a permit.'" Pet. App. 27a (quoting *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 458685, at *7 (served April 30, 2001). But voluntary discussions concerning railroad projects would often be fruitless without the recognition by local authorities that the national interest in an efficient and economically robust interstate rail system takes precedence over their parochial interests. See AAR 2d Cir. Br. 3. Thus, such discussions are, in fact, only voluntary.

[6] Green Mountain also sought declaratory relief from the STB, which the Board denied because the district court had "made clear its desire to resolve the issues raised without referring the matter to the Board." See *Green Mountain*, STB Fin. Dkt. No. 34052, 2002 WL 1058001, at *3; Pet. App. 20a. Nonetheless, the STB "summarize[d] relevant court and agency case law addressing similar situations" "to provide guidance to the Court and to the parties" regarding the nature and extent of Section 10501(b) preemption. *Ibid.* The Board explained that "State and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with rail transportation by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations" *Ibid.*

court explained, this was no longer true once PMI ceased operating at the site. "It is clear that * * * [states] may not apply a law like Act 250 [to rail transportation projects] so as to require pre-construction approval and permitting. Such a procedure is preempted by the ICCTA." *Id.* at 28a. The court noted that "[w]hile the state has the right to review [development] plans, it cannot, consistent with ICCTA preemption, require Green Mountain to secure Act 250 permits before commencing construction." *Id.* at 30a.

The court of appeals affirmed.[7] The court stressed that "the plain language [of the ICCTA] grants the [STB] wide authority over the transloading and storage facilities undertaken by Green Mountain." Pet. App. 7a. Based on its analysis of the broad statutory language and a variety of lower-court and STB decisions finding local permitting requirements for railroad facilities to be preempted, the court held that "Act 250's preconstruction permitting requirement is preempted" by Section 10501(b). *Id.* at 8a-10a. The court identified two distinct reasons why Act 250 and similar permitting schemes are preempted: "(i) [they] unduly interfere[] with interstate commerce by giving the local body the ability to deny the carrier to right to construct facilities or conduct operations, and (ii) [they] can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely." Pet. App. 10a (citations omitted).

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[7] The STB filed an *amicus* brief in the Second Circuit urging affirmance and stressing that "49 U.S.C. 10501(b) preempts all state and local permitting for rail construction and improvement activities." STB 2d Cir. Br. 1. As the Board explained, "Riverside is clearly a facility used in transportation by a rail carrier. Moreover, the transloading operations at Riverside are services related to the movement of property. Thus, a state or local permitting process for prior approval of the Riverside project is by its nature inconsistent with exclusive Board jurisdiction. Accordingly, the State's attempt to apply Vermont's land use permitting process to Green Mountain Railroad's facility is necessarily preempted." *Id.* at 12 (citations omitted).

Like the district court (see Pet. App. 25a) and the STB (see *Green Mountain*, 2005 WL 1058001, at *4), the court of appeals emphasized that "not all state and local regulations are preempted by [the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Id.* at 10a (citations and internal quotation marks omitted). For example, "[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, nondiscriminatory regulations would seem to withstand preemption." *Ibid.* (citing *Vill. of Ridgefield Park* v. *New York, Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 64 (N.J. 2000)). But by contrast, pre-construction permitting processes are necessarily preempted by the ICCTA. *Ibid.*

Finally, the court of appeals rejected petitioners' several arguments against preemption. First, the court explained that it "is the permitting process itself" that is preempted by the ICCTA, "not the length or outcome of that process in particular cases"—and thus the fact that in any given case the permitting authority *might* approve an application does not render the permitting process itself permissible. Pet. App. 11a-13a. Second, the court rejected the state's attempt to defend the application of Act 250 to Green Mountain's rail operations on the ground that Act 250 "is an environmental, rather than economic, regulation." *Id.* at 13a. As the court noted, "[t]he distinction is not useful. 'If local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.'" *Ibid.* (quoting *City of Auburn*, 154 F.3d at 1031). Finally, the court distinguished a prior Second Circuit case addressing the section of the ICCTA that delineates preemption in the context of motor carrier operations, 49 U.S.C. § 14501. See Pet. App. 15a. The court noted that preemption under Section 14501 is far narrower than preemption under Section 10501(b) and stressed that "'[i]t is difficult to imagine a

broader statement of Congress's intent to preempt state regulatory authority over railroad operations'" than Section 10501(b). Pet. App. 15a (quoting *CSX*, 944 F. Supp. at 1581).

REASONS FOR DENYING THE PETITION

Petitioners' primary argument in favor of certiorari is that there is a conflict among the lower courts over the preemptive scope of Section 10501(b). As we demonstrate in Part I, that conflict simply does not exist. Petitioners' policy arguments for review are similarly baseless. See Part II, *infra*. And as we explain in Part III, the lower court's decision was clearly correct. Thus, there is no reason for this Court to grant certiorari.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS OVER WHETHER SECTION 10501(b) PREEMPTS PRE-CONSTRUCTION PERMITTING PROCESSES AS APPLIED TO RAIL TRANSPORTATION ACTIVITIES AND FACILITIES THAT FALL WITHIN THE STB'S EXCLUSIVE JURISDICTION.

Petitioners identify a number of decisions with which, they assert, the Second Circuit's decision conflicts—going so far as to claim that courts "have repeatedly disagreed over the preemptive force of Section 10501(b) of the ICCTA." Pet. 10. But wishing does not make it so. In fact, the lower courts are not split at all over the question presented in this case. Instead, courts consistently have held that state permitting processes are preempted by Section 10501(b) for rail transportation facilities and services that fall within the exclusive jurisdiction of the STB.

The seminal case on the subject is *City of Auburn*, 154 F.3d 1025, which addressed whether The Burlington Northern and Santa Fe Railway could be required to comply with local environmental-review permitting processes before undertaking a variety of repairs and improvements on a rail line that passed through Auburn, Washington. The court held

that, as applied to these obviously transportation-related activities, these permitting processes were preempted by Section 10501(b). See *id.* at 1029-1031. In so holding, the court reviewed the text and history of the ICCTA and repeatedly stressed the broad nature of ICCTA preemption. See *ibid.*[8]

The holding in *City of Auburn* is by no means contentious. In fact, the two courts of appeals to consider the question—the Ninth Circuit and the Second Circuit in this case—both have so held.[9] So too have all other courts that have considered the issue, which consistently have held that state and local zoning, land use, building permit, and demolition laws and regulations are preempted insofar as they could in-

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[8] Petitioners assert that "[t]he Second Circuit's reliance on *City of Auburn* [in this case] was misplaced because the Ninth Circuit's ruling turned on the presence of an additional and broader preemption provision of the ICCTA that is not at issue here." Pet. 12 n.6. But that provision, 49 U.S.C. § 11321(a)—which addresses preemption in the context of railroad mergers or acquisitions (see 154 F.3d at 1030)—was merely an *additional* basis for finding preemption. The Ninth Circuit plainly focused on preemption under Section 10501(b) (see 154 F.3d at 1029-1031), and thus the Second Circuit appropriately relied on the Ninth Circuit's decision.

[9] The Fifth and Third Circuits have decided related questions entirely consistently with these decisions. In particular, although *Friberg* v. *Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), did not involve a prior permitting statute, the court in that case held that a state statute imposing restrictions on railroad operations was expressly preempted, explaining that "it is beyond peradventure that regulation of [the railroad's] train operations, as well as the construction and operation of the [railroad's] side tracks, is under the exclusive jurisdiction of the STB." See *id.* at 443. And in *Hi Tech Trans, LLC* v. *New Jersey*, 382 F.3d 295 (3d Cir. 2004), the Third Circuit held that Section 10501(b) did not preempt state permitting and licensure requirements for a solid waste disposal facility independently operated by a non-railroad on the ground that the "facility [did] not involve 'transportation by rail carrier'" as defined in the ICCTA. *Id.* at 308. Implicit in that decision was the court's understanding that had the facility fallen within the scope of the STB's exclusive jurisdiction over transportation-related activities and operations, the state's permitting scheme would have been preempted.

terfere with railroad construction projects or operations. See, *e.g.*, *Canadian Nat'l Ry. Co.* v. *City of Rockwood*, 2005 WL 1349077, at *4 (E.D. Mich. June 1, 2005) (local permitting requirements preempted as applied to railroad transload facilities); *Flynn* v. *BNSF Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (STB has exclusive jurisdiction over construction and operation of fueling facility and local permitting requirements are therefore preempted—even if STB does not regulate such construction or operations); *Soo Line R.R.* v. *City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local demolition permitting requirements expressly preempted as applied to railroad buildings); *Norfolk S. Ry. Co.* v. *City of Austell*, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997) (local zoning and land use regulations preempted).[10]

The STB, too, has read Section 10501(b) broadly to preempt any kind of local permitting or regulatory requirement that could stymie a railroad's construction or operating plans. See, *e.g.*, *N. San Diego County Transit Dev. Bd.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002) (California Coastal Commission regulation of construction of rail siding preempted); *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 1174385 (served Oct. 5, 2001) (state and local permitting and environmental review of construction and operation of railroad intermodal facility preempted); *Borough of River-*

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[10] Cf. *Wis. Cent. Ltd.* v. *City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000) (ICCTA reflects express, field, and conflict preemption; state attempt to use condemnation law to condemn an actively used railroad passing track preempted); *CSX*, 944 F. Supp. at 1581 (state regulation of closing of railroad station agencies preempted); *Vill. of Ridgefield Park*, 750 A.2d at 67 (complaints under local "nuisance" law preempted as applied to railroad maintenance facility); *Cedarapids Inc.* v. *Chicago Cent. & Pac. R.R.*, 265 F. Supp. 2d 1005, 1013-1014 (N.D. Iowa 2003) (preemption under Section 10501(b) applies broadly to operations on both main line and ancillary spur and industrial track).

dale—Petition for Declaratory Order—The New York, Susquehanna, & W. Ry. Corp., STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999) (local zoning and land use constraints concerning railroad's construction and operation of transload facility preempted); *Cities of Auburn & Kent, WA—Petition for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, STB Fin. Dkt. No. 33200, 1997 WL 362017, at *4 (served July 2, 1997) (local permitting process for prior approval of plans to modernize rail line preempted), *aff'd, City of Auburn*, 154 F.3d 1025.

Petitioners identify five cases that they assert conflict with this well-established rule. See Pet. 12-21. In fact, none of these cases is in any way inconsistent with it.

In particular, nothing in the Vermont Supreme Court's decision in *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), suggests that states may require railroads to submit to preconstruction permitting processes for transportation projects within the STB's jurisdiction.

Vermont Railway involved Burlington, Vermont's attempt to continue to apply its zoning ordinances to development activities at a site owned by the railroad after passage of the ICCTA. Located on that site were "antique shops, a roofing company, metal works, storage facilities, a salt shed, and semi-tractor storage." *Id.* at 651. Vermont Railway also "use[d] the property for storage and transfer of freight" and "store[d] equipment at the facility and under[took] repairs there." *Ibid.*

As the Vermont Supreme Court noted, "mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state or local regulation." *Id.* at 654 (internal quotation marks and citation omitted). For example, there is no question that Burlington could rely on its zoning or environmental permitting ordinances to control the development or redevelopment of "antique shops" or a "roofing company." This follows because Section 10501(b) gives the STB

exclusive jurisdiction *only* over "transportation by rail carriers" and the assorted tracks and facilities necessary for that "transportation." 49 U.S.C. § 10501(b).[11]

Thus, what the *Vermont Railway* case involved was the Vermont Supreme Court's attempt to draw a line between those activities that could properly be subject to the city's zoning regulations and those that, instead, fell within the STB's exclusive jurisdiction. In particular, consistent with the statute's plain language that Section 10501(b) only applies to rail "transportation" as that term is defined in the ICCTA, the court approved the application of Burlington's zoning ordinance only insofar as it addressed what the court characterized as "conditions [that] do not interfere with *railway* operations" (769 A.2d at 655 (emphasis in original)), such as "routing of trucks leaving the facility" or "the hours during which trucking can occur at the facility" (*ibid.*). Nothing in the court's decision suggests that the city could require the railroad to participate in a pre-approval permitting process for those activities that indisputably constitute "transportation by rail carrier[]" (49 U.S.C. § 10501(b)(1)).[12]

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[11] See, *e.g.*, *Hi Tech*, 382 F.3d at 308 (no preemption where non-railroad activities in rail yard are not within the exclusive jurisdiction of the STB); see also *Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson Cty., NJ*, STB Fin. Dkt. No. 34192, 2002 WL 31595417, at *2-*3 (served Nov. 20, 2002) (same).

[12] The line between what is and is not rail "transportation" as that term is broadly defined in 49 U.S.C. § 10102(9)—and thus what forms of activity by a railroad may properly be regulated by the states and what are, instead, within the STB's exclusive jurisdiction—can, of course, be difficult to determine in some instances. See, *e.g.*, Pet. App. 27a ("fact-bound question"). It is unclear from the decision, but the *Vermont Railway* court may have drawn that line in slightly the wrong place. See, *e.g.*, 769 A.2d at 655 (affirming the applicability of portions of the city's zoning ordinance to a "salt shed," but never explaining how that salt shed was used). Even if that were true, however, it is unrelated to the question presented in the petition for certiorari in this case and is no justification for the Court to grant review here. In particular, what constitutes rail transporta-

In fact, throughout this litigation petitioners have ignored the critical fact that ICCTA preemption is limited to *rail transportation activities*. In the Second Circuit, petitioners went so far as to assert that, if our interpretation of Section 10501(b) were correct, "[i]f a railroad wanted to construct a *ski resort* at the terminus of a rail line, the project would be immune to local zoning and Act 250 permitting requirements." Vt. 2d Cir. Br. 42 (emphasis added). But that is obviously false; the mere fact that a multinational corporation owned one rail line subject to STB jurisdiction would not suddenly exempt all of its entirely unrelated activities nationwide from all state or local regulation. Rather, only those specific projects or activities that fall within the STB's "exclusive" "jurisdiction" (49 U.S.C. § 10501(b)) are exempt from state or local regulation. That determination may be difficult to make at the margin—and may need to be litigated on a case-by-case basis before courts or the STB—but the appropriate question is whether a specific project falls within the STB's jurisdiction, not whether states may require railroads to engage in permitting or zoning processes for projects that indisputably fall within the STB's jurisdiction.

This basic proposition explains petitioners' remaining cases as well. For example, *Florida East Coast Railway* v. *City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), involved a site owned by a railroad that historically had been used for intermodal operations subject to the STB's jurisdiction (see *id.* at 1326), but that by the time of the litigation

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tion is a highly fact-bound issue. Cf. *Vermont Railway*, 769 A.2d at 655 (lamenting the "limited facts submitted to the trial court by the parties"). More importantly, in this litigation petitioners have never disputed that *all* of Green Mountain's services and activities at Riverside fall within the STB's "exclusive" jurisdiction over transportation by rail carrier. See note 4, *supra*. Rather, petitioners have only questioned the lower courts' holding that, for activities that *do* constitute rail transportation as defined in the ICA and thus fall within the STB's jurisdiction, states may not require railroads to participate in pre-construction permitting programs.

was instead leased by the railroad to a third party—Rinker—for use for an "aggregate distribution business" (*id.* at 1327). The property was not zoned for such a business, and thus the city issued cease-and-desist orders. See *ibid.* The court of appeals held that "*Rinker's* activities at the [site] were not 'rail transportation,'" and therefore that "ICCTA's pre-emption of state regulation of rail 'transportation'" did not preclude the city from requiring Rinker to comply with its zoning ordinances. *Id.* at 1336-1337 (emphasis added). The court stressed, however, that those ordinances "might or might not be pre-empted" had the railroad *itself* operated the facility (*ibid.*), and noted that "the City does not impose its generally applicable zoning ordinances against [the railroad]" (*id.* at 1331).[13]

The Alaska Supreme Court's decision in *Native Village of Eklutna* v. *Alaska Railroad Corp.*, 87 P.3d 41 (Alaska 2004), is also consistent with the Second Circuit's decision in this case. In *Native Village of Elkutna*, the Alaska Railroad owned a site on which there had long been a granite quarry. For years the railroad had leased the property to a third party that conducted "commercial quarrying operations" on the facility "in exchange for the Railroad receiving royalty payments." *Id.* at 44. After the Alaska courts held that this quarrying activity violated local zoning laws, the railroad started mining the quarry itself. See *ibid.* Unsurprisingly, the Alaska

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[13] Although there is some dictum in *Florida East Coast* that arguably espouses a fairly narrow view of ICCTA preemption (see Pet. 16-17), the court expressly limited its holding to the question whether ICCTA pre-emption precludes the application of zoning and permitting ordinances to activities that do not fall within the STB's jurisdiction over "transportation." In fact, the Court cited *City of Auburn* for the proposition that a "local environmental regulation applied against [a] railroad" could be "pre-empted by ICCTA." *Fla. E. Coast*, 266 F.3d at 1331-1332 (citing *City of Auburn*, 154 F.3d at 1029-1031). Thus, petitioners' are flatly incorrect in asserting that *Florida East Coast* "directly conflicts" (Pet. 17) with this case or with *City of Auburn*.

Supreme Court held that the zoning laws still applied despite this change. As the court explained, "Congress did not intend ICCTA to preempt state or local regulation with only 'a remote or incidental effect on rail transportation,'" such as by affecting the railroad's profits from a non-rail business. *Id.* at 57 (quoting *Fla. E. Coast*, 266 F.3d at 1331). But the court nowhere addressed the question addressed by the Second Circuit in this case—that is, whether railroads may be required to participate in a pre-approval permitting process for activities that plainly *are* part of "transportation" by rail carrier as defined in the ICA, and thus that fall within the STB's exclusive jurisdiction.

Iowa, Chicago & Eastern Railroad v. *Washington County*, 384 F.3d 557 (8th Cir. 2004), and *Home of Economy* v. *Burlington Northern Santa Fe Railroad*, 694 N.W.2d 840 (N.D. 2005)—which petitioners discuss at pages 19-21 of the petition for certiorari—are even further afield from this case. In fact, neither case involves a permitting process at all, let alone addresses the question whether Section 10501(b) preempts such systems with respect to transportation-related projects.

Rather, *Washington County* addressed the interaction between the ICCTA and the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, as applied to highway bridges over rail tracks. See 384 F.3d at 560-562. As the Eighth Circuit's decision establishes, that is an extremely complicated question—but one that has nothing whatsoever to do with this case.[14]

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[14] The Eighth Circuit's subsequent decision in *City of Lincoln* v. *STB*, 414 F.3d 858 (8th Cir. 2005), though also not addressing whether the ICCTA preempts permitting processes, demonstrates that the Eighth Circuit is firmly in the mainstream in its analysis of Section 10501(b). Citing *City of Auburn*, the Eighth Circuit stressed the broad scope of ICCTA preemption (see *id.* at 861), and held that a city has no authority to con-

Home of Economy, too, is simply off point. The case involved the question whether a private landowner could sue a railroad for damages and injunctive relief after the railroad closed a grade crossing leading to the landowner's business. See 694 N.W.2d at 841. Like the question presented in *Washington County*, this has nothing whatsoever to do with the validity of pre-construction permitting programs as applied to rail transportation. Furthermore, the North Dakota Supreme Court held that ICCTA preemption did not apply in this instance because the ICCTA "does not explicitly grant the [STB] *exclusive jurisdiction* over grade crossings." *Id.* at 844 (emphasis added). In other words, the court held that grade crossings do not fall within the scope of the Board's exclusive jurisdiction under Section 10501(b)—from which it necessarily follows that Section 10501(b) would not preempt state law. The court also stressed that the case involved the "states' traditional *police power* regarding grade crossings." *Id.* at 846 (emphasis added). As we discussed above (at 12), all courts—including the Second Circuit in this case—agree that "local bodies retain certain police powers which protect public health and safety" even with respect to activities related to rail transportation. See Pet. App. 10a. The *ex post* analysis of whether a specific exercise of a state's police power is preempted by the ICCTA is far different from the question whether pre-construction permitting systems are preempted. Nothing in *Home of Economy* addresses preemption of permitting processes, and thus petitioners' assertion that *Home of Economy* conflicts with the decision below is baseless.

* * * * *

Petitioners have taken a diverse set of cases addressing a number of issues bearing no relation to each other—except

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demn a portion of a railroad's right-of-way that the railroad explained *might* in the future be used for transportation-related projects. *Ibid.*

that one party in each case happens to be a railroad—and have spent a great deal of effort to present the cases as being in direct conflict with the Second Circuit's decision in this case. But petitioners acknowledge that the question presented in this litigation is whether, "[a]s applied to railroads, * * * pre-construction permitting programs [are] *per se* preempted by 49 U.S.C. § 10501(b)." Pet. i. As we have shown, no court has held that such permitting programs are *not* preempted with respect to transportation activities within the STB's exclusive jurisdiction. The purported conflict simply does not exist, and this Court's review is therefore unwarranted.

II. PETITIONERS' POLICY ARGUMENTS FOR REVIEW ARE BASELESS.

Petitioners also argue that this Court should grant review because the lower court's decision "eviscerates state and local authorities' historic police powers," and because the question presented "is a recurring issue that has been subject to ample analyses by the lower courts." Pet. 21-22. Neither argument is valid, and thus neither presents an adequate ground for further review.

For starters, petitioners vastly overstate the effect of the court of appeals' decision on the states' police powers. As the lower court explained (see Pet. App. 10a), in many instances the states' generally applicable police powers *can* be applied against railroads even though regulatory permitting processes are *per se* preempted. In particular, states may seek to enforce nondiscriminatory state and local requirements that do not depend on a preclearance or permitting process, such as building and electric codes. See page 12, *supra*; *Town of Ayer*, 2001 WL 458685, at *7.

Petitioners suggest that there would be little harm in making the railroad go through a preclearance process, especially in instances where the railroad would not need a license from the Board. But Congress's choice to restrict the states' ability to impose zoning and permitting requirements

on railroads—even to the extent that choice limits the states' historic police powers—is entirely justified; it was critically necessary to promote a uniform national rail system that will meet the transportation needs of interstate commerce. See S. REP. NO. 104-176, at 6 (1995). Petitioners' single-minded focus on local concerns ignores the fact that Congress's purpose in Section 10501(b) was to ensure that the national interest in an efficient, uniformly regulated and financially healthy rail system take precedence over parochial interests.

The hundreds of railroads operating across the United States form an intricate, largely fixed network of rail lines with critical intersecting points where traffic can be interchanged, rerouted, loaded, or transferred to another transportation mode. When most of the original lines and yards were constructed, the country was relatively sparsely populated, roads were bad or nonexistent, and, absent a waterway, no other long-distance transportation option was economical. Towns and cities naturally sprung up along railroad tracks, and they particularly concentrated at the places where goods and people could be loaded, unloaded, rerouted, or transferred to a boat or ship. When highways were built, including those that eventually formed the interstate highway system, they often paralleled rail lines and connected the same population and industrial centers that had grown up around the railroads. See AAR 2d Cir. Br. 1-2.

Rail lines cannot be picked up and moved from the communities, streets, and highways that have sprung up around them. Nor can they be moved from the rivers that historically provided the most natural location—both from an engineering standpoint and from a commercial standpoint—for many of those lines. Thus, most existing rail yards and intermodal facilities are located in urban or suburban areas of the country, and the most advantageous locations for new, expanded, or renovated facilities are usually in the same urban or suburban areas. See *ibid.* Rarely are such locations far from a residential or retail community. Typically, they are

hemmed in both by homes and businesses that have built up around them and by waterways and highways that often hug the existing facilities. Still, railroads sometimes have sufficient land within their existing rights of way to construct new facilities or to expand existing facilities, and sometimes they can purchase additional nearby property for a needed expansion or new construction project. *Ibid.*

Such projects are often vigorously opposed. It is not uncommon for an area to be zoned "residential" or "light commercial" even though an "industrial" railroad runs right through the middle of it. It is also not uncommon for "rail operations" to be omitted from the "permitted uses" prescribed by local land-use regulations for the very area in which a railroad operates. And even where local zoning or land-use regulations allow a particular rail construction project, state and local authorities can use permitting requirements for site plans, buildings, excavations, and other ostensible health and safety concerns to hold up almost indefinitely the construction, expansion, or renovation of a facility. Railroads are not averse to working cooperatively with local authorities to resolve critical local concerns—but as Congress recognized, the national interest in an efficient and economically robust interstate rail system must take precedence. See, *e.g.*, S. REP. NO. 104-176, at 6; pages 3-4, *supra*.

Petitioners' argument that it is "illogical" for the STB to have exclusive jurisdiction over certain intrastate rail facilities, even though prior Board authorization may not be needed to construct and operate those facilities (see Pet. 23), is also misplaced. As we discussed above (at 3), starting with the Staggers Act Congress began intentionally lessening the regulatory burden on the rail industry. There is nothing even novel, much less "illogical," about the idea that when Congress expressly decides to completely or partially deregulate an industry, it means it—and does not intend state or local governments to attempt to fill the "void." See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (regula-

tion of airline advertising); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) (regulation of corporate financial structures); *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (regulation of natural gas prices); see also *G&T Terminal Packaging Co.* v. *Consol. Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987) (ICC's exemption from regulation of traffic in fresh fruits and vegetables does not enable shipper to bring court action asserting common-law claims for unreasonable or discriminatory rates).[15]

Petitioners also suggest that there is something "illogical" about railroads being subject to the STB's regulatory authority over their "core" railroad projects—including environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370e—but not being subject to any regulatory authority over "ancillary" railroad projects such as the development of rail facilities at Riverside. See Pet. 23-24. But petitioners misapprehend the basis for the STB's NEPA review in situations in which it has licensing authority. It is *not* based on a distinction between "core" assets and other railroad assets. Railroads have long been permitted to engage in major construction projects involving their main line tracks—including doubling or tripling the number of tracks on a line or relocating the line altogether—without obtaining any additional license from the STB and thus without STB (or state or local) environmental review. See, *e.g.*, *City of Stafford* v. *S. Pac. Transp. Co.*, ICC Fin. Dkt. No. 32395, 1994 WL 613381 (served Nov. 8, 1994), *aff'd sub nom. City of Stafford* v. *ICC*, 69 F.3d 535 (5th Cir. 1995); *City of Detroit* v. *Canadian Nat'l Ry. Co.*, 9

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[15] Of course, as we discussed above (at 18), in order to qualify for Section 10501(b) preemption, the railroad activity in question must involve rail transportation activities or facilities as defined in the ICA; petitioners' examples of a solid waste landfill and a rock quarry (see pet. 23) almost certainly would not qualify as rail transportation within the STB's jurisdiction and thus may be fully regulated by the states.

I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Auth.* v. *ICC*, 59 F.3d 1314 (D.C. Cir. 1995). STB licensing of construction projects is needed only when a railroad seeks to construct new or extended lines or connections that would give the railroad new market access. *Ibid.*; see also *Texas & Pac. Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266 (1926); *Union Pac. R.R.—Petition for Declaratory Order—Rehabilitation of Mo.-Ks.-Tx. R.R. Between Jude and Ogden Junc., TX*, STB Fin. Dkt. No. 33611, 1998 WL 525587, at *5 (served Aug. 21, 1998) ("Because we do not have jurisdiction over UP's [major relocation] project, NEPA does not apply."). The railroads have always had the freedom to improve their existing main line facilities without STB review.

What was anomalous under the law prior to the enactment of the ICCTA was that although a railroad could improve its mainline facilities in markets it already served, without environmental review either by the STB or by state and local authorities, if it made an improvement in a rail yard, added a side track, or otherwise sought to improve the ancillary facilities that are vital to rail service, state or local authorities could tie up the railroad's project with their own "intrastate" licensing review. See 49 U.S.C. § 10907(b) (1982); *Ill. Commerce Comm'n*, 879 F.2d at 922-923. That was what Congress ended with Section 10501(b)(2), which now gives the STB "exclusive" jurisdiction over such ancillary track and facilities. Far from being "illogical," Congress's action made eminent sense in light of the national goal of encouraging the development of rail facilities. See *Cities of Auburn & Kent, WA*, 1997 WL 362017, at *7 (the ICCTA precludes both STB and state permitting authority over the construction and disposition of ancillary transportation facilities), *aff'd*, *City of Auburn*, 154 F.3d 1025.

Finally, petitioners' assertion that this Court's review is warranted because the meaning of Section 10501(b) "has been fully vetted by the courts in this nation" (Pet. 25) misses

the mark. As our discussion of the cases on which petitioners rely demonstrates, cases addressing ICCTA preemption are extremely fact-specific. See, *e.g.*, page 17 & n. 12, *supra*; Pet. App. 27a. Thus, review in this case would have little implication for cases not involving pre-construction permitting programs. And to the extent petitioners mean that the courts have "fully vetted" the question whether pre-construction permitting programs are *per se* preempted as applied to activities that constitute rail transportation under the ICA and therefore fall within the STB's exclusive jurisdiction—the question presented in this litigation—the courts that have "vetted" that issue have uniformly held that such permitting systems are preempted. In the absence of any identifiable dissent on that issue, this Court's review is clearly unnecessary.

III. THE SECOND CIRCUIT WAS PLAINLY CORRECT IN HOLDING PETITIONERS' PERMITTING PROCESS TO BE PREEMPTED BY THE ICCTA.

At heart this is a very simple case. Under Section 10501(b), the STB's jurisdiction over rail "transportation" is "exclusive," and "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." For purposes of Section 10501(b), "transportation" is defined broadly, and includes "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). There is no question that Green Mountain's activities and services at Riverside are "transportation" as that term is defined in Section 10102(9). Therefore, because the STB's jurisdiction over these projects is "exclusive" (49 U.S.C. § 10501(b)), the State's District Commissions and Environmental Board cannot *also* have jurisdiction over

them. Rather, the Act 250 permitting process is expressly preempted by Section 10501(b).

Petitioners nonetheless argue that the lower court erred See Pet. 25-30. None of petitioners' arguments has any merit.

First, petitioners' assertion that the plain language of the statute supports their position (Pet. 26) is baseless. In particular, by focusing on the phrase "'with respect to *regulation* of rail transportation'" (Pet. 26 (quoting 49 U.S.C. § 10501(b) (emphasis in petition)) in one sentence of Section 10501(b), petitioners ignore entirely the fact that Section 10501(b) specifically provides that "the jurisdiction of the Board over * * * transportation by rail carrier" is "exclusive." Furthermore, to the extent the phrase "with respect to regulation of rail transportation" does limit the preemptive scope of Section 10501(b), no plausible reading of that provision could authorize a state to require a railroad to participate in a permitting process, which is inherently regulatory.

Petitioners' *in pari materia* argument (Pet. 26-27) is similarly unsuccessful. Petitioners assert that Section 11501(b), which precludes states from taxing railroads discriminatorily, implies that Section 10501(b) must be interpreted narrowly. But Section 11501 of the ICCTA merely "replace[d] without substantive change former Section 11503 [of the ICA], which forb[ade] discriminatory State taxation of rail property as an unreasonable burden on interstate commerce." H.R. REP. NO. 104-311, at 108, 1995 U.S.C.C.A.N. at 820.[16] Prior to the ICCTA, this provision would plainly have been independently necessary. Given the litigation potential had Congress *removed* a provision specifying that states are precluded from taxing railroads discriminatorily,

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[16] In the version of the ICCTA addressed in the House Report Section 11501 would have been codified as Section 11301 (see H.R. REP. NO. 104-311, at 24), but the text is identical to that codified as Section 11501 in the enacted version.

Congress clearly could have decided that it was prudent to retain this provision even if it arguably might be viewed as redundant.

By contrast, 49 U.S.C. § 11321—discussed at Pet. 27—is not redundant at all. This provision gives the STB exclusive authority over mergers and acquisitions of railroads. Such corporate transactions implicate more than rail "transportation." Preemption under Section 11321 exempts a transaction "from the antitrust laws and all other law," including even collective bargaining agreements, "as necessary * * * to carry out the transaction. See *Norfolk & W. Ry. Co.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 119 (1991). Thus, the existence of this section has no bearing on the meaning of Section 10501(b).

Petitioners' reliance on *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)—see Pet. 27-28—is also misplaced, because the statute at issue in that case differs in important ways from the ICCTA. As the *Rice* Court explained, under that statute—the United States Warehouse Act—"the Secretary of Agriculture '[was] authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen', and their personnel, [but] 'the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under [that] act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect.' *Id.* at 223-224 (quoting statute). Thus, the Act specifically gave state authorities some role in the regulation of warehouses, and state law some effect on federally regulated warehouses. The ICCTA contains no similar provisions.[17]

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[17] As the Second Circuit explained, *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987)—cited at Pet. 28—is also irrelevant here. Unlike in *California Coastal*, "what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases." Pet. App. 11a.

Finally, petitioners suggest that there should be a presumption *against* preemption in this case. See Pet. 28-30. However, as this Court has explained, "'an assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Therefore, given the lengthy history of federal regulation of the railroad system (see pages 1-6, *supra*), there is no presumption against preemption in this case. See, *e.g.*, *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (citing *Locke*); *CSX Transp., Inc.* v. *City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000) ("There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our Nation's rail system."). As we explained above (at 12), there is no question that Congress intended to leave *certain* aspects of the states' police powers not preempted by Section 10501(b)—but there is also no suggestion anywhere in the statute or its legislative history that state or local permitting systems are not *per se* preempted. Given the plain text of the statute, such an interpretation would defy reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005

FILED
OCT 10 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-89

IN THE

Supreme Court of the United States

STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES, AND WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT,
Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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QUESTION PRESENTED

As applied to railroads, are pre-construction permitting programs *per se* preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act?

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REPLY BRIEF

In clear conflict with the Vermont Supreme Court and other courts, the Second Circuit held below that Vermont's statewide environmental and land use statute was *per se* preempted as applied to railroads by Section 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA). App. 15a. Unlike those other courts, which determine preemption by analyzing whether state laws actually interfere with railroad operations, the Second Circuit imposes preemption even where a state law has no impact upon railroad operations.

The Second Circuit's ruling is not only inconsistent with the court decisions identified in the petition, it also leaves virtually no room in this area for states to exercise their historic police powers to protect the health and safety of their citizens and to protect their natural resources. Review by this Court is necessary to resolve the split created by the decision below on this recurring and vital issue affecting federal-state relations.

Nothing in the Brief in Opposition of Respondent Green Mountain Railroad Corporation (GMRC) undermines this conclusion. GMRC first attempts to recast the Second Circuit's decision by equating the Surface Transportation Board's jurisdiction with the scope of preemption. Next, it attempts to use its jurisdictional argument to explain away the conflict among the courts on the preemptive scope of Section 10501(b). Last, it seeks to justify the Second Circuit's broad view of preemption by citing the need for uniform federal law.

Each argument is fundamentally flawed. The ICCTA, its history and the case law establish that the scope of preemption is not defined by the STB's jurisdiction. The conflicting court opinions did not ground their preemption analysis on jurisdiction and did not employ the *per se* preemption approach adopted by the Second Circuit. GMRC's policy arguments simply fail to appreciate the role left to the states in the ICCTA and only underscore the need for this Court to provide guidance in this important area.

I. The STB's Jurisdiction Does Not Define The Preemptive Scope Of Section 10501(b) And Does Not Reconcile The Conflict Among The Various Courts.

GMRC does not seek to defend the Second Circuit's decision on the merits, but rather offers an alternate theory that preclearance permitting programs are categorically preempted whenever the STB has *jurisdiction* over the area or activity in question.[1] Opp. 1, 13, 18. This faulty proposition, which provides the foundation for all its subsequent arguments that there is no split with the decision below, is not supported by the statute or the case law interpreting it. Even the STB does not agree that preemption under Section 10501(b) is fully co-terminus with its jurisdiction.

GMRC's application of this novel theory in an attempt to reconcile the cases presented in the petition is similarly unconvincing. Those cases did not base their preemption analysis on the scope of STB's jurisdiction, nor did they use the Second Circuit's categorical approach to preemption under Section 10501(b). Instead, each determined preemption by examining whether the state or local law actually interfered with railroad operations. Thus, there remains a significant conflict among the courts that requires this Court's review.

A. Jurisdiction Is Not The Proper Focus In Determining Preemption Under Section 10501(b).

GMRC's argument that the *scope of preemption* of Section 10501(b) is identical to the STB's *jurisdiction* is without merit. Opp. 1, 13, 18. That proposition runs counter to the statutory language, the legislative history, and the views of the STB on the preemptive scope of that section.

GMRC's argument erroneously conflates the first part of Section 10501(b), which defines the STB's jurisdiction, and the last sentence, which is the preemption provision. App. 34a.

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[1] Although the Second Circuit believed that the activities at issue were under the jurisdiction of the STB, it did not justify its preemption ruling on that ground. Pet. 9; App. 9a-10a.

When an issue or activity is arguably under the STB's "exclusive jurisdiction," the matter initially must be directed to the STB for resolution.[2] It is the last sentence of Section 10501(b), however, that defines the scope of preemption. App. 34a ("Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."). Although state laws cannot be preempted under Section 10501(b) if they do not address matters within the STB's jurisdiction (*e.g.*, not "transportation"), it does not follow that all state laws that touch on rail transportation are necessarily preempted.

Indeed, if the scope of preemption were defined by the STB's "exclusive jurisdiction," the preemption provision found in the last sentence of Section 10501(b) would be entirely superfluous. App. 34a. Of course, this is analytically unsound. *Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language "cannot be regarded as mere surplusage; it means something"); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (courts must give effect to every clause).

The legislative history of Section 10501(b) underscores the importance that Congress attached to the preemption provision found in the final sentence and its limited nature. As the petition demonstrates, the language of this preemption sentence was *changed* by the Committee of Conference and included an express limit on the exclusivity of remedies—a key point that GMRC fails to acknowledge. Pet. 29-30; Opp. 6 n.3. The Committee restricted the scope of preemption by adding the phrase, "with respect to regulation of rail transportation."[3]

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[2] As Judge Posner explains in *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (citing *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956)), "exclusive jurisdiction" is a form of primary jurisdiction that provides for initial evaluation of an issue by an agency. It is not a doctrine of preemption.

[3] The phrase "with respect to regulation of rail transportation" would

The insertion of this phrase reflected a compromise made by the Committee of Conference to competing Senate and House bills that differed as to the scope of preemption of Section 10501(b). Pet. 29. Far from being surplusage, the preemption provision and the limiting language added by the Committee of Conference was vital to the passage of the ICCTA. Contrary to GMRC's views (Opp. 18), the enacted version of Section 10501(b) was not intended to preempt everything having to do with rail transportation or under the STB's jurisdiction. The Conference Report makes plain that state police powers that do not unduly interfere with rail transportation are not preempted. *See* Opp. 6 n.3; H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess., 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852.

The suggestion that preemption is measured by the scope of the STB's jurisdiction is also refuted by the STB itself. In *Mid-America Locomotive and Car Repair, Inc., Petition for Declaratory Order*, S.T.B. Finance Docket. No. 34599, 2005 WL 1326958 at *3 (S.T.B.) (June 6, 2005), the STB explains that "section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation."[4] Thus, even the STB concentrates on the *effect* a state provision has on rail transportation—not whether the underlying activity is merely subject to its jurisdiction.[5]

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not have been inserted just to clarify that this preemption provision was referring to rail transportation. The section already twice delineated that the remedies addressed in Section 10501(b) were limited to those contained in "Part C-Rail Transportation."

[4]Admittedly, the STB would not apply this test to preclearance permitting programs because it also (and incorrectly) views them as *per se* preempted by Section 10501(b). Nonetheless, the STB approach belies GMRC's contention that the preemptive scope of Section 10501(b) is identical to the STB's jurisdiction.

[5] Indeed, if GMRC's argument were correct, it would logically lead to the preemption of state criminal laws and building codes when

GMRC's contention that preemption is determined solely by the scope of the STB's jurisdiction is simply wrong.

B. The Existing Splits Among The Courts Are Not Explained Away By The Purported Absence Of The STB's Jurisdiction.

GMRC's attempt to reconcile the cases set forth in the certiorari petition by applying its jurisdictional theory is, likewise, unpersuasive. Contrary to GMRC's arguments, both *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), and *Native Village of Eklutna v. Alaska R.R.*, 87 P.3d 41 (Alaska 2004), involved preclearance permitting programs that were applied to activities *within the STB's jurisdiction*. Opp. 16-20. In both cases, the courts refused to utilize the type of *per se* preemption applied by the Second Circuit and, instead, rightly analyzed whether the state or local law placed an undue burden on railroad operations.

The additional court splits described in the petition also remain. Pet. 16-21. Those courts did not adopt GMRC's jurisdictional test of preemption under Section 10501(b) and did not employ the Second Circuit's categorical bar. Like *Vermont Railway* and *Native Village*, those courts based their preemption analysis on whether the state action at issue imposed a significant burden on the railroad. Intervention by this Court to resolve this recurring issue of national importance is therefore still necessary.

1. *In re Appeal of Vermont Railway.*

GMRC mistakenly contends that because the Vermont

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applied to matters falling within the STB's jurisdiction. Yet, all parties agree that Congress did not intend to preempt such laws.

Supreme Court did not explicitly state that the salt shed and all the facilities at issue in *Vermont Railway* were under the STB's exclusive jurisdiction, the court's decision does not conflict with the decision below. Opp. 16-18. This argument is without merit and ignores the fact that both this case and *Vermont Railway* involved similar permitting programs being applied to similar salt sheds and intermodal facilities that did fall within the jurisdiction of the STB. Pet. 13-15. And, unlike the Second Circuit, the Vermont Supreme Court did not view such preclearance permitting programs as *per se* preempted by Section 10501(b). 769 A.2d at 655.

The Vermont Supreme Court's entire preemption analysis was premised on the assumption that the facility at issue was within the STB's jurisdiction.[6] The court specifically found that some conditions imposed by the City of Burlington on the salt shed and facility were preempted by Section 10501(b). 769 A.2d at 655 (affirming the lower court's decision that several conditions relating to the salt shed were not preempted, while other conditions *relating to the same salt shed* were preempted). It could not have made that determination without necessarily finding that the matter was within the STB's jurisdiction.[7]

More importantly, if GMRC's theory were correct, the Vermont Supreme Court would have started (and ended) its analysis by determining whether the salt shed or the facility fit

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[6] In fact, similar to this case, the railroad in *Vermont Railway* argued unsuccessfully that the salt shed (and its other activities at the facility) should be immune from permitting requirements as being *per se* preempted by section 10501(b). 769 A.2d at 650-51 (rejecting argument that ordinances were "preempted entirely").

[7] GMRC attempts to cast some doubt into the striking similarities between *Vermont Railway* and the ruling below by explaining (in a footnote) that the Vermont Supreme Court "may have drawn the line [for jurisdiction of the STB] in slightly the wrong place." Opp. 17-18 n.12. This only demonstrates that GMRC recognizes that there is obvious conflict between the two decisions.

within the STB's jurisdiction. On that basis, it would have decided whether it was permissible for Burlington to impose its permitting program on the railroad. Of course, that is not what happened. Instead, the court analyzed the specific permit conditions holding that the "proper approach" is to evaluate each of the conditions at issue to determine "whether they stood as an obstacle to the goals of the ICCTA." 769 A.2d. at 655. Nowhere does the court suggest that the STB's jurisdiction is determinative.

Both the Second Circuit and the Vermont Supreme Court addressed preconstruction permitting programs that were applied to similar facilities and sheds owned by similar railroads. Pet 13-15. The Second Circuit found that Section 10501(b) entirely preempts preclearance permitting programs. App. 15a. In stark conflict with that decision, the Vermont Supreme Court's test was whether any of the conditions imposed by the permitting program "interfere[d] with railroad operations." 769 A.2d at 655.

Based on the divergence between the Vermont Supreme Court and its corresponding court of appeals, this Court should grant the petition.

2. *Native Village of Eklutna.*

GMRC's argument that the split between the Second Circuit and the Alaska Supreme Court can be explained by examining STB jurisdiction, once again, misses the mark. Opp. 20. The court's preemption analysis in *Native Village* did not turn on whether the STB had jurisdiction, and it directly contradicts the Second Circuit's *per se* approach to preemption.

At issue in *Native Village* was whether the railroad could be "force[d] to obtain a conditional use permit for [a] quarry" or whether Section 10501(b) preempted Anchorage's zoning ordinances with respect to the railroad property. 87 P.3d at 56. Directly contradicting GMRC's assertion (Opp. 20) that *Native Village* involved activities that fell outside the jurisdiction of the STB, the Alaska Supreme Court expressly found that "obtaining ballast [from the quarry] for Railroad's tracks is

arguably 'integrally related' to its operation." 87 P.3d at 57. *Compare GMRC*, App. 7a, 13a (GMRC's "proposed transloading and storage facilities are integral to the railroad's operation" and are within STB jurisdiction). Nonetheless, the Alaska Supreme Court recognized that "Congress did not intend ICCTA to preempt state or local regulation with only 'a remote or incidental effect on rail transportation,'" and found that Anchorage's permitting program was not preempted. *Id.*

In addition, unlike the Second Circuit, the Alaska Supreme Court found that preclearance permitting programs are not *per se* preempted when applied to rail transportation. It concluded that a proper preemption analysis required a review of the specific conditions at issue, and a "fact-bound determination" at to their actual impact on railroad operations. *Id.*; *compare GMRC*, App. 13a ("we need not conduct a fact-based inquiry weighing the economic impact"). The conflict between these two cases remains.

3. The Additional Court Splits Identified In The Petition Remain.

As with *Vermont Railway* and *Native Village*, the other conflicting cases discussed in the petition (Pet. 16-21) did not use the STB's jurisdiction as a "bright line" rule to gauge whether the state or local regulation was preempted, nor did they use the Second Circuit's blanket approach to preemption. In *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court did not view the scope of the STB's jurisdiction as being determinative of its decision on preemption. Rather, the court engaged in an extensive discussion and analysis of Section 10501(b) and found that the plain language placed express limitations on the law's preemptive scope. 266 F.3d at 1330. Its discussion of preemption constitutes a plain rejection of the type of *per se* preemption employed by the Second Circuit. *Id.* at 1339 (finding that although the ordinances might "not [be] optimally efficient" for the railroad, they "do not impede the interstate functioning of the railroad industry" and are not preempted).

Other cases cited in the petition, such as *Iowa, Chicago & Eastern R.R. v. Washington County*, 384 F.3d 557 (8th Cir. 2004), and *Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840 (N.D. 2005), are similar. They did not measure preemption by STB jurisdiction, and they did not apply the Second Circuit's categorical bar. For example, in *Washington County*, the court found that the administrative proceedings commenced by the state were not *per se* preempted and could continue. 384 F.3d at 561; *see Home of Economy*, 694 N.W. at 846 (finding no preemption when state exerted traditional police power).

In sum, GMRC's jurisdictional argument cannot harmonize the divergent judicial views of preemption under the ICCTA. The Second Circuit's decision that preclearance permitting requirements are *per se* preempted remains in conflict with other courts of appeals and state supreme courts. This Court should grant the petition to bring clarity to this area.

II. GMRC's Policy Arguments Underscore That This Case Involves An Important Question Of State And Federal Relations That Should Be Resolved By This Court.

While GMRC makes valid points regarding a "uniform national rail system" and Congress's intent to standardize "economic regulation" of rail transportation in the ICCTA, it is also clear (and the parties agree) that Congress *did* intend to leave room for States to regulate in this area. Opp. 22-23. As GMRC concedes, and courts have noted, Congress did not intend to preempt "the states' generally applicable police powers to the extent that those police powers do not impose a substantial burden on rail transportation." Opp. 6 n.3. This case, which involves an important and historic police power used by states and local authorities to manage land-use, control economic development, and protect the environment, thus falls at the hazy crossroads of federal and state authority.

Some courts have interpreted the preemptive scope of Section 10501(b) broadly in a perceived effort to standardize

economic regulation of rail transportation. Opp. 2-3, 23-26. For some of these courts, the "balance" of the competing interests of the states and the federal government tips in favor of the federal interests. Indeed, some of these courts have explicitly chosen not to apply the traditional "assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *See* Opp. 30 (citing *United States v. Locke*, 529 U.S. 89, 108 (2000) (suggesting that "an assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence"); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

Other courts have recognized the vital interests states have in protecting health, safety, and the environment. *See* Pet. 16 n.9 (citing courts that have found no preemption). Many of these courts have retained the well-established assumption against preemption in cases that involved the exercise of these historic police powers. *Home of Economy*, 694 N.W.2d at 842-43 (citing *Locke*, but retaining assumption); *Native Village*, 87 P.3d at 56 (applying assumption with no mention of *Locke*); *Vermont Railway*, 769 A.2d at 652 (same).

State and local laws, like Act 250, play a crucial role in protecting interests that are not directly regulated by federal law. Pet. 22-25. Congress intended that these laws should be applied when they do not significantly impact railroad operations. The Second Circuit's *per se* bar forecloses states and localities from even attempting to make this showing. As demonstrated by the wide divergence on how courts analyze the preemptive scope of Section 10501(b) and also the results the courts have reached, it is necessary for this Court, for the first time, to provide guidance on this important national issue.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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OCTOBER 2005